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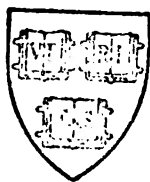
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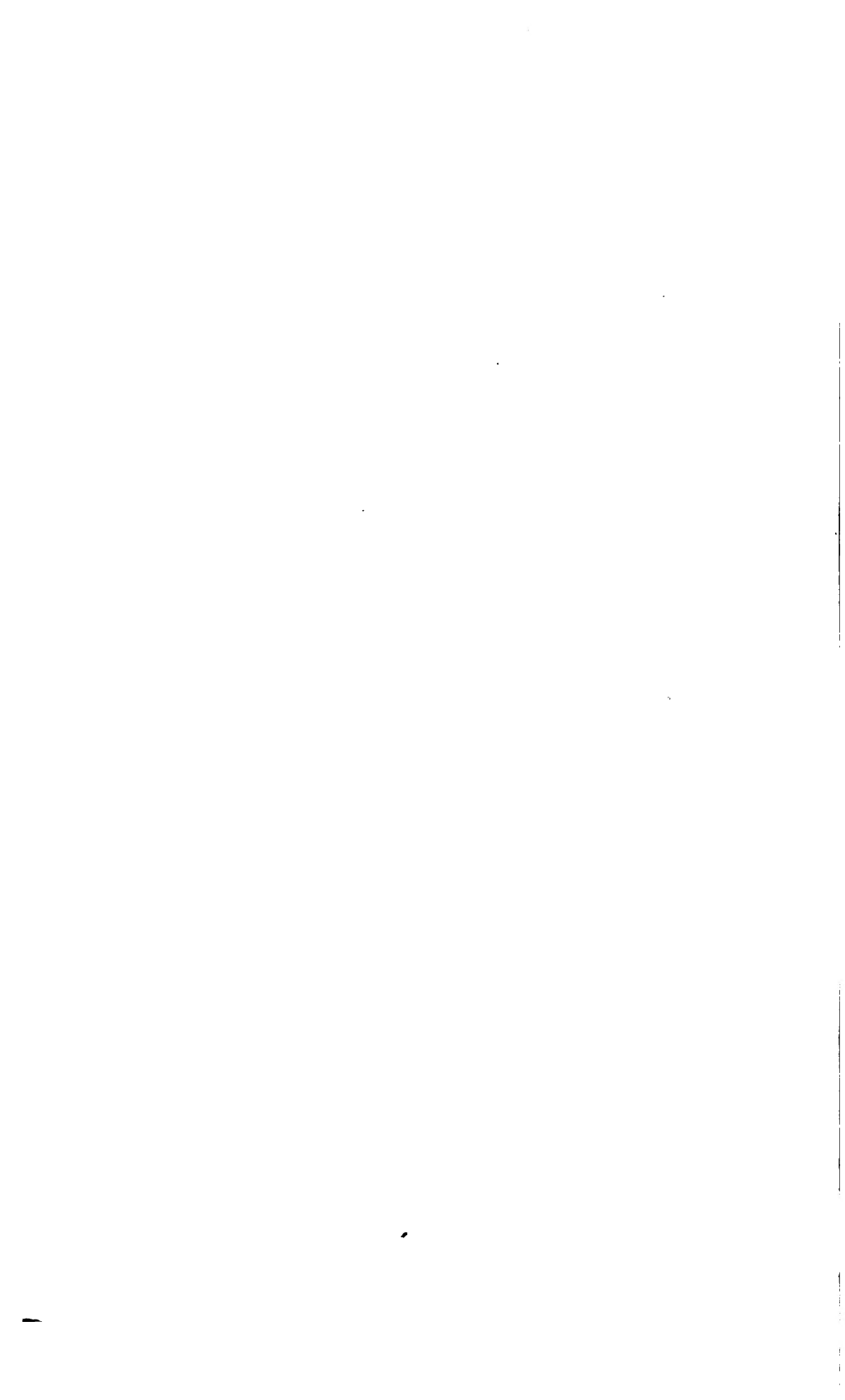


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REPORTS OF CASES

DECIDED IN THE

C

COURT OF APPEALS

OF THE

STATE OF NEW YORK

FROM AND INCLUDING DECISIONS OF OCTOBER 1, 1906, TO
DECISIONS OF JANUARY 8, 1907,

WITH

NOTES, REFERENCES AND INDEX.

By EDWIN A. BEDELL,
STATE REPORTER.

24

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EDWARD T. BARTLETT,

ALBERT HAIGHT,

IRVING G. VANN,

WILLIAM E. WERNER,

ASSOCIATE JUDGES.

WILLARD BARTLETT,

FRANK H. HISCOCK,

EMORY A. CHASE,

JUSTICES OF THE SUPREME COURT SERVING AS ASSOCIATE
JUDGES.*

* Designated by the Governor January 8, 1906, under section 7 of article VI of the Constitution, as amended in 1899.

REPORTED IN THIS VOLUME.

V

	PAGE.		PAGE.
Bronx Borough Bank of New York, New York Brick & Paving Co. v.	559	City of New York, Brandt v.	599
Brooklyn Heights R. R. Co., Cranch v.	310	City of New York, Johnson v.	139
Brooklyn Heights R. R. Co., Haddam Granite Co. v.	247	City of New York, Kronold v.	40
Brooklyn Heights R. R. Co., Morehouse v.	529	City of New York, McKnight v.	35
Bruen, Irving v.	605	City of New York, Metropolitan Milk & Cream Co. v.	533
Buck, Calhoun v.	598	City of New York, Roach v.	592
Buffalo Loan, T. & S. D. Co. v. Carstensen.	608	City of New York, Mayor, etc., of, v. Harlem Bridge, M. & F. Ry. Co.	304
Buffalo Union Furnace Co., Stenger v.	323	City of New York, Mayor, etc., of, In re (Van Cortlandt Ave.).	237
Bultman, Merker v.	573	City of New York, People ex rel., v. Lyon.	545
Burger v. Snare & Tricist Co.	610	City of Rome, Rogers v.	610
Burr, McCarg v.	467	City of Syracuse, Cholet v.	520
Butler v. Frontier Telephone Co.	468	City of Troy, Common Council of, People ex rel. Troy Press Co. v.	548
Butler v. Supreme Council Am. L. of H.	514	City Trust Co. of New York, Tschetinian v.	432
Butler v. Village of Oxford.	444	Cody v. Hadcox.	520
Butler v. Wright.	259	Coe, In re Weeks v.	531
C.		Coley v. Tallman.	569
Calhoun v. Buck.	598	Colonial Assurance Co., Arlington Co. v.	570
Callahan v. Godwin.	578	Colter, Nester v.	568
Cameron, Ullman v.	339	Common Council of City of Troy, People ex rel. Troy Press Co. v.	548
Carolan v. Yoran.	575	Conger v. Ensler.	388
Carr, House v.	529	Conlon v. Mission of the Immaculate Virgin, etc.	613
Carstensen, Buffalo Loan, T. & S. D. Co. v.	608	Conover, Broadwell v.	429
Case v. New York Mutual Savings & Loan Assn.	570	Consolidated Gas Co., Grossman v.	541
Celluloid Co., Welle v.	319	Consolidated Gas Co., Richman v.	209
Chamberlain v. Home Insurance Co.	601	Continental Trust Co., Stokes v.	285
Cholet v. City of Syracuse.	520	Cooley, In re (Estate).	220
Citizens' Steamboat Co., Lord v.	604	Cooper v. Payne.	334
City of Binghamton, Rogers v.	593	County of Jefferson v. County of Oswego.	555
City of Geneva, People ex rel., v. Geneva, W., S. F. & C. L. Tr. Co.	516	County of Oswego, County of Jefferson v.	555
City of New Rochelle, Molloy v.	603	Cousino v. Watertown Paper Co.	513

TABLE OF CASES REPORTED.

vii

PAGE.	PAGE.
Coy, Hunt & Co., Michigan Savings Bank v..... 607	Ferguson, Horrmann v.... 544
Cranch v. Brooklyn Heights R. R. Co.... 310	Finn v. Smith. 465
Cunningham, In re..... 268	Flagler v. Devlin. 589
Cunningham, Reinheimer v.... 595	Fogel v. Interborough Rapid Transit Co. 531
D.	Fox v. Hopkins. 515
Damón, American Guild of Richmond, Va., v..... 360	Fox v. New York City Interborough Ry. Co..... 524
Davis, In re..... 267	Fromer v. Ottenberg..... 561
Delaware & Hudson Canal Co., Genet v 422	Frontier Telephone Co., Butler v. 486
Desmond, People ex rel. Keim v. 232	Fuehrman v. McCord..... 566
Devlin, Flagler v..... 589	Furey, In re Morgan v.... 202
Dolan, People v..... 4	G.
Donohue v. American Bridge Co..... 609	Gavigan Co., Martin v..... 559
Doon v. American Surety Co... 598	Gehrhardt v. Schwartz 574
Doscher, Alt v..... 566	Gehring, In re..... 267, 268
Dougherty v. Neville 578	Gein v. Little. 528
Dressner v. Dressner 568	Genet v. Delaware & Hudson Canal Co..... 422
Dumont, Ely v. 552	Geneva, City of, People ex rel., v. Geneva, W., S. F. & C. L. Tr. Co..... 516
E.	Geneva, W., S. F. & C. L. Tr. Co., People ex rel. City of Geneva v. 516
Easthampton Lumber & Coal Co. v. Worthington ... 407, 581	German-American Bank of Buffalo, King v.... 530
Eastman Kodak Co. v. Kleinhans. 613	Gibbs, In re, v. O'Brien..... 513
Ebling Brewing Co. v. New York City Interborough Ry. Co 524	Gilliam v. Guaranty Trust Co.. 127
Eighth Ward Bank of Brooklyn v. McLoughlin..... 527	Glens Falls Portland Cement Co., Hudson River Water Power Co. v..... 597
Elias, Platt v. 374	Gloster, In re..... 266
Ellenbogen, People v..... 603	Gluckman v. Strauch..... 560
Ely v. Dumont 552	Godwin, Callahan v..... 578
Ensler, Conger v.. 588	Gordon, In re (Estate)... . 471
Equitable Life Assur. Society, Bracher v. 62	Goreth v. Shipperl..... 553
Erie R. R. Co., Erwin v..... 550	Grant v. Pratt & Lambert..... 611
Erwin v. Erie R. R. Co.. 550	Greenberg, In re..... 267
Excelsior Brewing Co., Motzing v..... 577	Greenleaf, Waite v..... 558
F.	Greenwood Cemetery, Brechtlein v..... 530
Farrell, Middleton v..... 572	Grossman v. Consolidated Gas Co..... 541
Far Rockaway Bank v. Norton. 484	Guaranty Trust Co., Gilliam v. 127

PAGE.	PAGE.
Guayaquil & Quito Ry. Co., Prun v. 583	Hurlbut, People ex rel., v. Bing- ham 523, 538
II.	Hussey, In re. 267
Hadcox, Cody v. 520	I.
Haddam Granite Co. v. Brook- lyn Heights R. R. Co. 247	Independent Nominations, In re. 266
Hanford, In re (Estate) 547	In re Adler 266
Hannah, In re. 266	In re Adolph 547
Harlem Bridge, M. & F. Ry. Co., Mayor, etc., of New York v. . 304	In re Bennett. 266
Hatton v. Supreme Council, Catholic Benevolent Legion. . 577	In re Brevillier. 268
Hempstead, Town of, Sandi- ford v. 554, 587	In re Cooley (Estate) 230
Herzog Teleseme Co. v. Majes- tic Hotel Co. 563	In re Cunningham. 268
Hickory Grove Cemetery, Pal- mer v. 593	In re Davis. 267
Hirsch, Smith v. 580	In re Gehring. 267, 268
Hoffman, In re. 266	In re Gibbs v. O'Brien. 513
Home Insurance Co., Chamber- lain v. 601	In re Gloster. 266
Hood v. Lehigh Valley R. R. Co. 517	In re Gordon (Estate) 471
Hopkins, Fox v. 515	In re Greenberg. 267
Hopkins, In re (Will). 580	In re Hanford (Estate). 547
Horning v. Hudson River Tele- phone Co. 552	In re Hannah. 266
Horrmann v. Ferguson. 544	In re Hoffman 266
House v. Carr. 529	In re Hopkins (Will). 580
Howell, Barnes v. 550, 580	In re Hull. 585
Howell v. John Hancock Mutual Life Ins. Co. 556, 595	In re Hull (Estate). 586
Hubbs, Michigan Savings Bank v. 607	In re Hussey. 267
Hudson & Manhattan R. R. Co. v. Wendel. 535	In re Independent Nominations. 266
Hudson River Telephone Co., Horning v. 532	In re Keogh. 544, 610
Hudson River Water Power Co. v. Glens Falls Portland Cement Co. 597	In re Kerns. 267
Hull, In re. 585	In re Leffler. 266
Hull, In re (Estate). 586	In re Lehner. 266
Hummel, People ex rel., v. Reardon. 164	In re Logan. 267
	In re Long. 266
	In re Lord (Estate). 549
	In re Lyon. 267
	In re Mayor, etc., of New York (Van Cortlandt Ave.). 237
	In re Morgan v. Furey 202
	In re O'Rourke v. Bingham. . . 535
	In re Payne v. O'Brien. 1, 587
	In re Pendleton v. O'Brien. . . . 1
	In re Pilsbury (Will). 545
	In re Pitney. 540
	In re Quimby. 266
	In re Riley. 268
	In re Rock. 267
	In re Saxe. 266

TABLE OF CASES REPORTED.

ix

	PAGE.		PAGE.
In re Schroeder.....	537	Kelsey, People ex rel. Sixty	
In re Sherrill v. O'Brien.	1	Wall Street v.....	543
In re Speranza.....	280	Kenny, People ex rel., v. Bing-	
In re Strong.....	584	ham.....	522, 589
In re Terry.....	266	Keogh, In re.....	544, 610
In re Waterman.....	534	Kerns, In re.....	267
In re Webster.....	536	Kidansky, Bach v.....	368
In re Webster v. Purcell.....	549	King v. German-American Bank	
In re Weeks v. Coe.....	531	of Buffalo.. . . .	530
In re Westchester Trust Co....	215	Kingston, Brevoort Real Estate	
Interborough Rapid Transit Co.,		Co. v.....	584
Fogel v.....	531	Kleinhans, Eastman Kodak Co.	
International Paper Co., Serviss		v.....	618
v.....	562	Knickerbocker Trust Co. v.	
International Railway Co., Tietz		Oneonta, C. & R. S. Ry. Co..	527
v.....	347	Kremer v. New York Edison Co.	557
Iowa Central Ry. Co., Rand v.	58	Kronold v. City of New York..	40
Irving v. Bruen.....	605	Kuehn v. Syracuse Rapid Trans-	
		it Ry. Co....	567
J.		Kuelling v. Roderick Lean	
Jacobs v. N. Y. C. & H. R. R.		Manfg. Co.....	579
R. Co.....	586		
Jacobson v. Stone.....	606	L.	
Jaffe, People v.....	560	La Chicotte, People ex rel., v.	
Jefferson, County of, v. County		Best.....	522
of Oswego.....	555	Lamora, Rockefeller v....	567
Jefferson Power Co., Maldoon v.	518	Lautz v. Williams.....	551
Jemison v. Bell Telephone Co.		Lawrence v. McKelvey.....	588
of Buffalo.....	493	Lawrence, Neubrech v.....	557
Jennings v. Supreme Council,		Leffler, In re.....	266
Loyal Additional Benefit Assn.	571	Lehigh Valley R. R. Co., Hood	
John Hancock Mutual Life Ins.		v.....	517
Co., Howell v.....	556, 595	Lehner, In re.....	266
Johnson v. City of New York..	139	Leo v. McCormack.....	330
Johnston v. Long Island Invest-		Levy v. Popper.....	600
ment & Improvement Co....	553	Lewis, People ex rel. Walters v.	583
		Litchfield v. Bond.....	66
K.		Little, Gein v.....	528
Kearny v. Metropolitan Trust		Livingston, People ex rel., v.	
Co.....	611	Wyatt.....	368
Keating v. Manhattan Railway		Logan, In re.....	267
Co.....	614	London Assurance Corporation,	
Keefe v. N. Y. C. & H. R. R.		Smith v.....	541
R. Co.....	594	Long, In re.....	266
Keim, People ex rel., v. Des-		Long Island Investment &	
mond.....	232	Improvement Co., Johnston	
Kelly v. Security Mut. Life Ins.		v.....	553
Co.....	16, 553		

	PAGE.		PAGE.
Lord v. Citizens' Steamboat Co.	604	Matter of Hopkins (Will).....	580
Lord, In re (Estate).....	549	Matter of Hull	585
Lugar, Bayer v.....	569	Matter of Hull (Estate)....	586
Lyon, In re.....	267	Matter of Hussey.....	267
Lyon, People ex rel. City of New York v	545	Matter of Independent Nomina- tions	266
M.		Matter of Keogh	544, 610
		Matter of Kerns.....	267
McCarg v. Burr.....	467	Matter of Leffler.....	266
McClintic - Marshall Construc- tion Co., Mengle v.....	564	Matter of Lechner.....	266
McCord, Fuehrman v.....	566	Matter of Logan	267
McCormack, Leo v	330	Matter of Long.....	266
McKelvey, Lawrence v	588	Matter of Lord (Estate)	549
McKnight v. City of New York.....	35	Matter of Lyon.....	267
McLoughlin, Eighth Ward Bank of Brooklyn v.....	527	Matter of Mayor, etc., of New York (Van Cortlandt Ave.)..	237
Majestic Hotel Co., Herzog Teleseme Co. v.....	563	Matter of Morgan v. Furey....	202
Maldoon v. Jefferson Power Co..	518	Matter of O'Rourke v. Bingham.	535
Male, Bowers v.....	28	Matter of Payne v. O'Brien. 1,	587
Mandeville, Wilson v.....	604	Matter of Pendleton v. O'Brien.	1
Manhattan Railway Co., Keat- ing v.....	614	Matter of Pillsbury (Will).....	545
Manhattan Ry. Co., Scallon v..	528	Matter of Pitney.	540
Mannasovitch, People v.....	592	Matter of Quimby	266
March v. March	99	Matter of Riley.....	268
Marsh, Smith v.....	605	Matter of Rock.....	267
Martin v. Babcock & Wilcox Co.....	451	Matter of Saxe.....	266
Martin v. Gavigan Co.....	559	Matter of Schroeder.....	537
Matter of Adler.....	266	Matter of Sherrill v. O'Brien....	1
Matter of Adolph.....	547	Matter of Speranza.....	280
Matter of Bennett....	266	Matter of Strong.....	584
Matter of Brevillier.....	268	Matter of Terry.....	266
Matter of Cooley (Estate)	220	Matter of Waterman.....	534
Matter of Cunningham.....	268	Matter of Webster.....	536
Matter of Davis.....	267	Matter of Webster v. Purcell..	549
Matter of Gehring.....	267, 268	Matter of Weeks v. Coe.....	531
Matter of Gibbs v. O'Brien	513	Matter of Westchester Trust Co.....	215
Matter of Gloster.....	266	Mayer, Blun v.....	542
Matter of Gordon (Estate).....	471	Mayor, etc., of New York v. Harlem Bridge, M. & F. Ry. Co.....	304
Matter of Greenberg.....	267	Mayor, etc., of New York, In re (Van Cortlandt Ave.).....	237
Matter of Hanford (Estate). ..	547	Mendham, Simonson v.....	579
Matter of Hannah.....	266	Mengle v. McClintic-Marshall Construction Co.....	564
Matter of Hoffman.....	266	Merker v. Bultman.....	573

TABLE OF CASES REPORTED.

xi

PAGE.	PAGE.
Metropolitan Milk & Cream Co. v. City of New York..... 533	New York, City of, McKnight v. 85
Metropolitan Trust Co. Kearny v..... 611	New York, City of, Metropolitan Milk & Cream Co. v. ... 538
Michigan Savings Bank v. Coy, Hunt & Co 607	New York, City of, Roach v... 592
Michigan Savings Bank v. Hubbs..... 607	New York City Interborough Ry. Co., Ebling Brewing Co. v 524
Michigan Savings Bank v. Millar..... 606	New York City Interborough Ry. Co., Fox v..... 524
Middleton v. Farrell..... 572	New York, Mayor, etc., of, v. Harlem Bridge, M. & F. Ry. Co..... 304
Milage v. Woodward..... 252	New York, Mayor, etc., of, In re (Van Cortlandt Ave.)... 287
Millar, Michigan Savings Bank v..... 606	New York, City of, People ex rel., v. Lyon..... 545
Minsky, Silverman v..... 576	New York Edison Co., Kremer v..... 557
Mission of the Immaculate Virgin, etc., Conlon v..... 613	New York Juvenile Asylum, People ex rel., v. O'Donnell. 585
Molloy v. City of New Rochelle. 608	New York Mutual Savings & Loan Assn., Case v..... 570
Monroe Eakstein Brewing Co., Snyder v..... 529	New Yorker Staats-Zeitung, Nunnally v..... 582.
Morehouse v. Brooklyn Heights R. R. Co..... 529	Niles v. Sire..... 578
Morgan, In re, v. Furey..... 202	North German Lloyd S. S. Co., Brinck v..... 525
Motzing v. Excelsior Brewing Co. 577	North German Lloyd S. S. Co., Tewes v. 151, 525
Myer v. Abbett..... 519	Norton, Far Rockway Bank v. 484
N.	Nunnally v. New Yorker Staats-Zeitung..... 582
National Biscuit Co., Shane v. 514	Nunnally v. Tribune Association..... 583
Nelson, People v..... 554	O.
Nester v. Colter..... 568	O'Brien, In re Gibbs v..... 518
Neubrech v. Lawrence 557	O'Brien, In re Payne v..... 1, 587
Neville, Dougherty v..... 578	O'Brien, In re Pendleton v..... 1
New Rochelle, City of, Molloy v..... 603	O'Brien, In re Sherrill v..... 1
New York Brick & Paving Co. v. Bronx Borough Bank of New York.. 559	O'Donnell, People ex rel. New York Juvenile Asylum v. ... 585
N. Y. C. & H. R. R. R. Co., Jacobs v... .. 586	O'Rourke, In re, v. Bingham.. 535
N. Y. C. & H. R. R. R. Co., Keefe v..... 594	O'Shaughnessy v. Ætna Life Ins. Co. 589
N. Y. C. & H. R. R. R. Co., Russell v..... 519	Oneonta, C. & R. S. Ry. Co., Knickerbocker Trust Co. v.. 527
New York, City of, Brandt v.. 599	
New York, City of, Johnson v. 139	
New York, City of, Kronold v. 40	

xii TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Oswego, County of, County of		People ex rel. Walters v. Lewis	588
Jefferson v.....	555	Percival v. Percival....	587
Ottenberg, Fromer v.....	561	Peters v. Slattery.....	574
Oxford, Village of, Butler v...	444	Phalen v. United States Trust	
		Co.....	178
P.		Pierle v. Smith.....	603
Palmer v. Hickory Grove Cem-		Pierson, Allen v....	546
etery.....	598	Pillsbury, In re (Will).....	545
Parkhurst, Warren v.....	45	Pitney, In re.....	540
Payne, Cooper v.....	334	Platt v. Elias.....	374
Payne, In re, v. O'Brien....	1, 587	Pluckham v. American Bridge	
Peace v. Wilgon.....	408	Co.....	561
Pendleton, In re, v. O'Brien...	1	Popper, Levy v.....	600
People v. Dolan.....	4	Port Chester, Village of, Theall	
People v. Ellenbogen.....	608	v.....	602
People v. Jaffe.....	560	Porter v. Preferred Accident	
People v. Mannasovitch.....	593	Ins. Co.	590
People v. Nelson.....	554	Postal Telegraph Cable Co.,	
People v. Rogers.....	516	Birkett v....	591
People v. Strolla.....	526	Powers, Wanamaker v.	582
People v. Tompkins....	413	Pratt, Hurst & Co. v. Taffler...	417
People ex rel. City of Geneva v.		Pratt & Lambert, Grant v.....	611
Geneva, W., S. F. & C. L.		Preferred Accident Ins. Co.,	
Tr. Co.....	516	Porter v.....	309
People ex rel. City of New York		Preston v. Brinley.....	515
v. Lyon.....	545	Prayn v. Guayaquil & Quito	
People ex rel. Hummel v. Rear-		Ry. Co.....	583
don....	164	Purcell, In re Webster v.....	549
People ex rel. Hurlbut v. Bing-			
ham.....	528, 538	Q.	
People ex rel. Keim v. Desmond.	232	Quimby, In re.....	206
People ex rel. Kenny v. Bing-		Quinn, People ex rel., v. Voor-	
ham.....	522, 539	his.....	203
People ex rel. La Chicotte v.			
Best.....	522	R.	
People ex rel. Livingston v.		Rafalsky, Walter v.....	543
Wyatt.....	383	Rand v. Iowa Central Ry. Co..	58
People ex rel. New York Juve-		Reardon, People ex rel. Hum-	
nile Asylum v. O'Donnell....	565	mel v.....	164
People ex rel. Quinn v. Voorhis.	268	Reardon, People ex rel., v. Bing-	
People ex rel. Reardon v. Bing-		ham.....	522, 589
ham.....	522, 539	Reinheimer v. Cunningham....	595
People ex rel. Sixty Wall Street		Reporters' Association of Amer-	
v. Kelsey.....	543	ica v. Sun Printing & Pub-	
People ex rel. Troy Press Co. v.		lishing Assn.....	437
Common Council of City of		Richman v. Consolidated Gas	
Troy.....	548	Co.....	209
		Riley, In re.....	208

TABLE OF CASES REPORTED.

xiii

PAGE.	PAGE.
Roach v. City of New York... 592	Smith, Pierle v..... 602
Robinson, Turck v..... 571	Snare & Triest Co., Burger v... 610
Rock, In re..... 267	Snyder v. Monroe Eckstein Brewing Co..... 599
Rockefeller v. Lamora..... 567	Spencer, Scott v..... 581
Roderick Lean Mfg. Co., Kueelling v..... 579	Speranza, In re..... 280
Rogers v. City of Binghamton. 595	Standard Distilling & Distrib- uting Co., Windmuller v ... 572
Rogers v. City of Rome. . . . 610	Starkweather v. Sundstrom.... 591
Rogers, People v..... 516	Stenger v. Buffalo Union Fur- nace Co..... 323
Rome, City of, Rogers v..... 610	Stokes v. Continental Trust Co. 285
Ross v. Bayer-Gardner-Himes Co..... 612	Stone, Jacobson v..... 608
Russell v. N. Y. C. & H. R. R. R. Co..... 519	Stoops, Beetson v..... 456
	Strauch, Gluckman v..... 560
S.	Strolla, People v..... 526
St. Regis Paper Co. v. Santa Clara Lumber Co..... 89, 578	Strong, In re..... 584
St. Regis Paper Co. v. Tona- wanda Board & Paper Co.... 563	Sun Printing & Publishing Assn., Reporters' Association of America v..... 487
Sandiford v. Town of Hamp- stead 554, 587	Sundstrom, Starkweather v.... 591
Santa Clara Lumber Co., St. Regis Paper Co. v..... 89, 578	Supreme Council, Am. L. of H., Butler v. 514
Saxe, In re..... 266	Supreme Council, Catholic Benevolent Legion, Hatton v..... 577
Scallion v. Manhattan Ry. Co.. 528	Supreme Council, Loyal Addi- tional Benefit Assn., Jennings v..... 571
Schroeder, In re..... 587	Swenson v. Wilson & Baillie Manfg. Co..... 555
Schwartz, Gehrhardt v..... 574	Swift v. American Exchange Nat. Bank 521
Scott v. Spencer. 581	Syracuse, City of, Cholet v.... 520
Security Mut. Life Ins. Co., Kelly v..... 16, 558	Syracuse Rapid Transit Ry. Co., Kuehn v..... 567
Serviss v. International Paper Co..... 562	
Shane v. National Biscuit Co.. 514	T.
Sherrill, In re, v. O'Brien 1	Tailer, Pratt, Hurst & Co. v... 417
Shipherd, Goreth v..... 553	Tallman, Coley v..... 569
Silverman v. Minsky 576	Terry, In re..... 266
Simonson v. Mendham..... 579	Tewes v. North German Lloyd S. S. Co..... 151, 525
Sire, Niles v..... 578	Theall v. Village of Port Ches- ter. 602
Sixty Wall Street, People ex rel., v. Kelsey..... 543	Tietz v. International Railway Co..... 347
Slattery, Peters v..... 574	
Smith, Finn v..... 465	
Smith v. Hirsch..... 590	
Smith v. London Assurance Cor- poration..... 541	
Smith v. Marsh..... 605	

PAGE.		PAGE.	
Tittle v. Van Valkenburg	597	Waite v. Greenleaf.....	558
Tompkins, People v.....	418	Walter v. Rafalsky.....	543
Tonawanda Board & Paper Co., St. Regis Paper Co. v.....	563	Walters, People ex rel., v. Lewis.....	583
Town of Hempstead, Sandiford v.....	554, 587	Wanamaker v. Powers.....	562
Tribune Association, Nunnally v.....	538	Warren v. Parkhurst.....	45
Triest v. Vassar.....	565	Waterman, In re.....	534
Troy, City of, Common Council of, People ex rel. Troy Press Co. v.....	548	Watertown Paper Co., Cousino v.....	513
Troy Press Co., People ex rel., v. Common Council of City of Troy.....	548	Webster, In re.....	536
Tschetinian v. City Trust Co. of New York.....	482	Webster, In re, v. Purcell.....	549
Turck v. Robinson.....	571	Weddigan v. Whiting.....	596
Twaddell v. Weidler.....	601	Weeks, In re, v. Coe.....	531
Tyson v. Bauland Co.....	397	Weidlör, Twaddell v.....	601
U.		Welch, Willard v.....	564
Ullman v. Cameron.....	339	Welle v. Celluloid Co.....	319
Union Salt Co., Arnot v.....	501	Wendel, Hudson & Manhattan R. R. Co. v.....	585
United States Leather Co. v. Aldrich.....	558	Westchester Trust Co., In re.....	215
United States Trust Co., Phalen v.....	178	Whiting, Weddigan v.....	596
V.		Willard v. Welch.....	564
Van Valkenburg, Tittle v.....	597	Williams, Lantz v.....	551
Vassar, Triest v.....	565	Wilson, Boisnot v.....	598
Village of Oxford, Butler v.....	444	Wilson v. Mandeville.....	604
Village of Port Chester, Theall v.....	602	Wilson, Peace v.....	403
Voorhis, People ex rel. Quinn v.	263	Wilson & Baillie Manfg. Co., Swenson v.....	555
W.		Windmuller v. Standard Distill- ing & Distributing Co.....	572
Waite v. Greenleaf.....	558	Woodward, Milage v.....	252
Walter v. Rafalsky.....	543	Worthington, Easthampton Lumber & Coal Co. v.....	407, 581
Walters, People ex rel., v. Lewis.....	583	Wright, Butler v.....	259
Wanamaker v. Powers.....	562	Wyatt, People ex rel. Livings- ton v.....	383
Warren v. Parkhurst.....	45	Y.	
Waterman, In re.....	534	Yoran, Carolan v.....	575
Watertown Paper Co., Cousino v.....	513		
Webster, In re.....	536		
Webster, In re, v. Purcell.....	549		
Weddigan v. Whiting.....	596		
Weeks, In re, v. Coe.....	531		
Weidlör, Twaddell v.....	601		
Welch, Willard v.....	564		
Welle v. Celluloid Co.....	319		
Wendel, Hudson & Manhattan R. R. Co. v.....	585		
Westchester Trust Co., In re.....	215		
Whiting, Weddigan v.....	596		
Willard v. Welch.....	564		
Williams, Lantz v.....	551		
Wilson, Boisnot v.....	598		
Wilson v. Mandeville.....	604		
Wilson, Peace v.....	403		
Wilson & Baillie Manfg. Co., Swenson v.....	555		
Windmuller v. Standard Distill- ing & Distributing Co.....	572		
Woodward, Milage v.....	252		
Worthington, Easthampton Lumber & Coal Co. v.....	407, 581		
Wright, Butler v.....	259		
Wyatt, People ex rel. Livings- ton v.....	383		

TABLE OF CASES

CITED IN THE OPINIONS REPORTED IN THIS VOLUME.

A.		PAGE.
Acer v. Hotchkiss.....	97 N. Y. 395	364
Adsit v. Brady.....	4 Hill, 631.....	84
Aiken v. Benedict.....	39 Barb. 400.....	489
Albert v. Grosvenor Investment Co.	L. R. (3 Q. B.) 123.....	510
American Print Works v. Law- rence.....	23 N. J. Law, 590.....	72
Anson v. People.....	148 Ill. 503.....	11
Appo v. People.....	20 N. Y. 581.....	394
Atkins v. Albree.....	12 Allen, 359.....	290, 294
Attorney-General v. Guardian Mut. L. Ins. Co.....	77 N. Y. 272	35
Atwater v. Trustees of Canan- dagua.....	124 N. Y. 602	87

B.		
Bacon v. Burnham.....	37 N. Y. 614.....	486
Ballou v. State of N. Y.....	111 N. Y. 500.....	83
Baltimore City Pass. R. Co. v. Hambleton.....	77 Md. 341.....	294
Bank of Havana v. Magee.....	20 N. Y. 355, 359.....	344
Bank of Montgomery v. Reese.....	26 Pa. St. 143, 146; 31 Pa. St. 78.	293
Barnes v. City of Brooklyn.....	22 App. Div. 520	39
Bassell v. Elmore.....	65 Barb. 627.	442
Bathgate v. Haskin.....	59 N. Y. 533.....	365, 367
Beecher v. Long Island R. R. Co...	161 N. Y. 222.....	317
Belger v. Dinsmore.....	51 N. Y. 166.....	155, 156
Beltz v. City of Yonkers.....	148 N. Y. 67	448
Bennett v. Harper.....	86 W. Va. 546.....	484
Bennett v. Houldsworth.....	L. R. (6 Ch. Div.) 671	189
Bennett v. McGuire.....	58 Barb. 635.....	345
Bermel v. N. Y., N. H. & H. R. R. Co.....	62 App. Div. 389; 172 N. Y. 639.	163
Bigelow v. Stearns..	19 Johns. 39.....	470
Binninger v. City of N. Y.....	177 N. Y. 199, 214	309
Bisson v. W. S. R. R. Co.....	148 N. Y. 125.....	133
Blackstone v. Miller.....	188 U. S. 189..... 474, 475, 476, 477	
Bomeisler v. Forster.....	154 N. Y. 229.....	263
Borland v. Welch.....	162 N. Y. 104.....	186

	PAGE.
Boston & Albany R. R. Co. v. } O'Reilly..	158 U. S. 384..... 44
Bradley v. Andrews.....	51 Vt. 580..... 150
Bradley v. Bosley.....	1 Barb. Ch. 125..... 374
Bradley & Currier Co. v. Pacheteau.	71 App. Div. 148; 175 N. Y. 492. 466
Brander v. Brander.....	4 Ves. 800 and notes (Sumner ed.). 290
Brassell v. N. Y. C. & H. R. R. R. } Co.....	84 N. Y. 241..... 316
Brewster v. Rogers Co.	169 N. Y. 73, 80..... 75
Briggs v. Briggs.....	20 Barb. 477..... 365
Brown v. Odill.....	104 Tenn. 250..... 19, 26
Buchanan v. Tilden.....	158 N. Y. 109..... 186
Buel v. Southwick.....	70 N. Y. 581..... 115
Bunnell v. Stern.....	123 N. Y. 541..... 401
Burtis v. Thompson.....	42 N. Y. 246..... 19, 26

C.

Carstens v. McDonald.....	38 Neb. 858..... 19
Carver v. People.....	89 Mich. 786..... 10
Castle v. Duryee.....	1 Abb. Ct. App. Dec. 327..... 150
Catlin v. Grissler.....	57 N. Y. 878..... 176
Chapin v. Dobson.....	78 N. Y. 74..... 338
Chipman v. Montgomery.....	63 N. Y. 221..... 464
Chipman v. Palmer.....	77 N. Y. 51..... 55
Cincinnati, etc., R. R. Co. v. Carper.	112 Ind. 26..... 352
Clark v. Eighth Ave. R. R. Co....	36 N. Y. 135..... 353
Clune v. Brooklyn Elev. R. R. Co..	15 N. Y. S. R..... 353
Cockcroft v. Muller.....	71 N. Y. 367..... 365
Cogswell v. N. Y., N. H. & H. } R. R. Co.....	108 N. Y. 10, 21..... 74
Colby v. Colby.....	81 Hun, 231..... 196
Conger v. N. Y., W. S. & B. R. R. } Co.....	120 N. Y. 29..... 182
Conolly v. Hyams.....	176 N. Y. 408..... 88
Conway v. City of Rochester.....	157 N. Y. 83..... 208
Cook v. Cook.....	100 Mass. 194..... 442
Coonley v. Wood.....	36 Hun, 559..... 366
Corson v. City of New York.....	78 App. Div. 481..... 448
Costigan v. Mohawk & H. R. R. Co.	2 Denio, 609..... 257, 258
Coulter v. Richmond.....	59 N. Y. 478..... 486
Coverdale v. Eastwood.....	L. R. (15 Eq.) 121..... 187
Craighead v. Brooklyn City R. R. } Co.....	123 N. Y. 391..... 356
Crapo v. City of Syracuse.....	188 N. Y. 395..... 89
Craven v. International Ry. Co....	100 App. Div. 157..... 353
Crouch v. Gutmann.....	134 N. Y. 45..... 412
Cunningham's Appeal.....	108 Pa. St. 546..... 294

TABLE OF CASES CITED.

xvii

		PAGE.
Currie v. White.....	45 N. Y. 822.....	290
Cutter v. Powell.....	2 Smith's L. Cas. 1.....	27

D.

Daniels v. Newton.....	114 Mass. 580.....	19
Day v. Hunt.....	112 N. Y. 191.....	97, 182
Dean v. Negley.....	41 Pa. St. 312.....	379
De Frece v. National Life Ins. Co..	136 N. Y. 144, 151.....	24
De Groot v. McCotter.....	19 N. J. Eq. 581.....	511
De La Cuesta v. Ins. Co.....	186 Pa. St. 62.....	294
Dillon v. Anderson.....	43 N. Y. 281.....	257
Dillon v. Parker.....	1 Swans. 359.....	462
Dix v. Atkins.....	128 Mass. 43.....	18
Dodin v. Dodin.....	16 App. Div. 42.....	184
Doe v. Burt.....	1 T. R. 701.....	490
Dougherty v. Milliken.....	163 N. Y. 527.....	321, 322
Douglas v. Vincent.....	2 Vernon, 201.....	181, 188
Dousman v. Wisconsin, etc., Co...	40 Wis. 418, 421.....	292
Doyle v. Crean.....	1 Irish R. (1905) 259.....	190
Draper v. Brown.....	115 Wis. 361.....	40
Dunham v. Townshend.....	118 N. Y. 286.....	176
Dunn v. West.....	5 B. Monroe, 876, 381.....	365
Durfour v. Ferraro.....	Hargraves Jurid. Arg. 304.....	182
Durr v. N. Y. C. & H. R. R. R. Co.	184 N. Y. 820.....	440
Dusenbury v. Hulbert.....	59 N. Y. 541.....	374

E.

Eardley v. Owen.....	10 Beav. 572.....	190
Easthampton L. & C. Co. v. } Worthington.....	186 N. Y. 407.....	581
Edison v. Parsons.....	155 N. Y. 555.....	195
Edson v. Girvan.....	29 Hun, 422.....	202
Ehrgott v. Mayor, etc., of N. Y....	96 N. Y. 264.....	44
Eldman v. Bowman.....	58 Ill. 444, 447.....	202
Elghmie v. Taylor.....	98 N. Y. 288.....	388
Eldridge v. City of Binghamton....	120 N. Y. 809.....	246
Emmens v. Elderton.....	4 H. L. Cas. 646.....	257
Equitable Life Assur. Socy. v. } Cuyler.....	75 N. Y. 511.....	304
Ex parte Braudlacht.....	2 Hill, 367.....	394

F.

Filer v. N. Y. C. R. R. Co.....	59 N. Y. 351.....	352
Finch v. Carpenter.....	5 Abb. Pr. 225.....	406
Finley v. Bent.....	95 N. Y. 864.....	109, 115, 116, 124
Fisher v. Banta.....	66 N. Y. 468.....	125
Fisher v. Charter Oak Life Ins. Co.	20 J. & S. 179.....	202

	PAGE
Fitzhugh v. Hubbard.....	41 Ark. 64..... 464
Fordham v. Gouverneur Village...	160 N. Y. 541..... 419
Forster v. Scott.....	136 N. Y. 577 ... 81
Frazer v. Western.....	1 Barb. Ch. 220..... 346
Freel v. County of Queens.....	154 N. Y. 661..... 364
Freeman v. Freeman.....	43 N. Y. 34 ... 194
Frost v. Josselyn.....	180 Mass. 189. ... 149
Frost v. Knight.....	L. R. (7 Ex.) 111..... 26
Fuchs v. Koerner.....	107 N. Y. 529..... 259
Fuller v. Jameson.....	184 N. Y. 605..... 60, 61
Fuller v. N. Y. Fire Ins. Co.....	184 Mass. 12. ... 61

G.

Gale v. Gale.....	L. R. (6 Ch. Div.) 144, 148..... 187
Gall v. Gall.....	{ 64 Hun, 600; 138 N. Y. 675.... 184 185, 198
Garson v. Green.....	1 Johns. Ch. 308. ... 374
Gaskell v. Harman.....	11 Ves. 439, 496 ... 110
Gatens v. Metr. St. Ry. Co....	89 App. Div. 311 ... 353
Gates v. Gates.....	34 App. Div. 608 ... 184
Gere v. Dibble.....	17 How. Pr. 31 ... 345
Getzoff v. City of New York.....	51 App. Div. 450..... 448
Gillespie v. Torrance.....	25 N. Y. 306 ... 366
Gilliam v. Bird.....	8 Iredell (Law), 280. 490
Gilmour v. Colcord.....	183 N. Y. 342..... 466
Gleason v. Metr. St. Ry. Co.....	99 App. Div. 209..... 335
Gonzales v. N. Y. & Harlem R. R. Co.	39 How. Pr. 407..... 352
Gouider v. Goulder ...	L. R. (2 Ch. Div. 1905) 100. 113
Graham v. Manhattan Ry. Co ...	149 N. Y. 336. 354
Gray v. Goodrich.....	7 Johns. 95..... 14
Gray v. Metr. St. Ry. Co.....	39 App. Div. 536... .. 354
Gray v. Portland Bank.....	3 Mass. 364. ... 291, 293
Greenland v. Waddell.....	116 N. Y. 234 ... 125
Griffin v. Mutual Life Ins. Co.....	11 Am. Bank, Rep. 623. 61
Guille v. Swan.....	19 Johns. 381..... 150

H.

Haack v. Weicken.....	118 N. Y. 67 ... 464
Hale v. Henkel.....	201 U. S. 43..... 392
Hallett v. Thompson ...	5 Paige, 583. 346
Hamilton v. City of Buffalo.....	173 N. Y. 72 ... 448
Hamilton v. McPherson.....	28 N. Y. 76. 257
Hammond v. Edison Illuminat- ing Co.....	{ 181 Mich. 79 ... 294
Hanna v. Wilcox.....	53 Iowa, 547 ... 361
Hart v. Penn. R. R. Co.....	112 U. S. 331. 158

TABLE OF CASES CITED.

xix

	PAGE.
Hart v. St. Charles St. R. R. Co.	30 La. Ann. 758 294
Havens v. Sackett.	15 N. Y. 365 463
Heerwagen v. Crostown St. Ry. Co.	179 N. Y. 99 364
Helm v. Wolf.	1 E. D. Smith, 73 254
Henderson v. Nassau Elec. R. R. Co.	46 App. Div. 280 354
Henneasy v. Patterson.	85 N. Y. 91 115
Henry v. Leigh.	3 Campb. 499 11
Hibbs v. Union Cent. Life Ins. Co.	40 Ohio St. 554 464
Hillman v. Newington.	57 Cal. 56 54, 55
Hoadly v. Wood.	71 Conn. 452 117
Hochster v. De La Tour.	2 El. & B. 678 26
Hope v. Brewer.	136 N. Y. 126, 134 104
Horton v. McCoy.	47 N. Y. 21 125
Howard v. Daly.	61 N. Y. 362, 370 19, 26, 254, 257
Huhlein v. Huhlein.	87 Ky. 247 464
Humboldt Driving Park Assn. v. } Stevens. }	34 Neb. 528, 534. 294
Hun v. Cary.	82 N. Y. 67 35
Hunt v. Chapman.	51 N. Y. 555 367
Hutcheon v. Mannington.	1 Ves. 366 108, 110
Hyatt v. Vanneck.	82 Md. 465 464

I.

Ide v. Brown.	178 N. Y. 26 135, 198
In re Ayers.	123 U. S. 500, 501 84
In re Brockman's Trust.	L. R. (5 Ch. App.) 183 190
In re Kohler's Estate.	199 Pa. St. 455 138
In re Wilkins.	L. R. (18 Ch. Div.) 634 111, 115
Isler v. Isler.	88 N. C. 581 464

J.

Jackson v. Buel.	9 Johns. 298 492
Jackson v. Root.	18 Johns. 60, 73 13
Jarvis v. Sewall.	40 Barb. 449 176
Jennings v. Grand Trunk R. Co.	127 N. Y. 438 162, 163
Jermain v. L. S. & M. S. Ry. Co.	91 N. Y. 483, 491 225
Johnson v. Brooks.	93 N. Y. 337 262
Johnson v. Crook.	{ L. R. (12 Ch. Div.) 639 110, 111 113, 116, 119, 122
Johnston v. Fargo.	184 N. Y. 379 163
Johnston v. Spicer.	107 N. Y. 185 183, 185, 197
Jones v. Concord & Montreal R. } R. Co }	67 N. H. 119 293, 294
Jones v. Martin.	3 Anstr. 822; 5 Ves. 266, note 188
Jones v. Morrison.	31 Minn. 140, 152 292
Jones v. Reilly.	174 N. Y. 104 18

	K.	PAGE.
Kearney v. Mayor, etc., of N. Y...	92 N. Y. 617, 621.....	13
Keays v. Gilmore.....	Irish R. (8 Eq.) 296.....	189
Keene v. Barnes.....	29 Mo. 377.....	464
Kendall v. Stone.....	1 Selden, 14.....	442, 443
Kenney v. N. Y. C. & H. R. R. R. Co.	125 N. Y. 422.....	163
Kenyon v. K. T. & M. M. A. Assn.	122 N. Y. 247.....	24
Keyes v. Little York Gold W. & } W. Co.	58 Cal. 724.....	53, 54
King v. Sun P. & P. Co.....	84 App. Div. 310; 170 N. Y. 600.	442
King v. Waterman.....	55 Neb. 824.....	19
Knapp v. Publiishers George } Knapp & Co.....	127 Mo. 53.....	294
Knickerbocker Life Ins. Co. v. } Ecclesine.....	2 J. & S. 76.....	441
Kohm v. Interborough Rapid } Transit Co.....	104 App. Div. 237.....	355
L.		
Lally Dacre's Case	1 Lev. 58.....	490
Lahr v. Met. El. Ry. Co....	104 N. Y. 268.....	244
Lambeth v. N. C. R. R. Co.....	66 N. C. 494.....	351
Lambton v. Mellish	L. R. (3 Ch. Div. 1894) 163..	52
Landau v. City of New York	180 N. Y. 48.....	145
Langan v. Supreme Council Am. } L. of H.....	174 N. Y. 286.....	20, 21, 22
Lansing v. Coney Island & B. R. } R. Co.....	16 App. Div. 146.....	354
Laver v. Fielder	32 Beav. 1.....	188
Law v. Thompson	4 Russ. 92, 100	110
Lazarus v. Metr. El. R. Co....	145 N. Y. 581, 585.....	406
Le Gendre v. Scottish U. & N. } Ins. Co.....	183 N. Y. 392.....	506
Lehr v. Steinway & H. P. R. R. } Co.....	118 N. Y. 556	354
Leighton v. Orr.....	44 Ia. 679.....	391
Lent v. Howard	89 N. Y. 169	104
Lent v. N. Y. C. & H. R. R. R. Co.	120 N. Y. 467.....	352
Leonard v. Crommelin	1 Edw. Ch. R. 206.....	463
Leprell v. Kleinschmidt	112 N. Y. 364.....	489
Lighthouse v. Third Nat. Bank...	162 N. Y. 336.....	263
Linden v. Graham	1 Duer, 670.....	442, 443
Little Schuylkill Nav. Co. v. } Richards' Admr.....	57 Pa. St. 142.....	56
Lockwood Co. v. Lawrence.....	77 Me. 297.....	49, 53
Lucas v. Metr. St. Ry. Co.....	56 App. Div. 405.....	353
Lynch v. Brooklyn City R. R. Co..	5 N. Y. Supp. 311; 123 N. Y. 657.	44

TABLE OF CASES CITED.

xxi

M.		PAGE.
M'Instry v. Tanner.....	9 Johns. 185.....	4
McCarogher v. Whieldon.....	L. R. (3 Eq.) 286.....	199
McCord v. People.....	46 N. Y. 470.....	415, 416
McCourt v. Eckstein.....	22 Wis. 153.....	489
McCrea v. Vil. of Champlain.....	85 App. Div. 89.....	406
McCulloch v. Hoffman.....	78 N. Y. 615.....	13
McDonald v. Metr. St. Ry. Co.....	167 N. Y. 66.....	151
McDowell v. King.....	4 Dana (Ky.), 67.....	490
McGillis v. McGillis.....	11 App. Div. 859.....	133
McGinnis v. McGinnis.....	1 Ga. 496	464
McGuire v. Spence.....	91 N. Y. 308.....	150
McKinstry v. Sanders.....	2 T. & C. 181.....	108, 123
Magnin v. Dinsmore.....	56 N. Y. 168.....	156, 162
Magnin v. Dinsmore.....	62 N. Y. 85.....	157, 162
Magnin v. Dinsmore.....	70 N. Y. 410.....	157
Mahaney v. Carr.....	175 N. Y. 454.....	185, 198
Margraf v. Muir.....	57 N. Y. 155.....	182
Marks v. Long Island R. R. Co.....	14 Daly, 61.....	44
Mason v. Henry.....	152 N. Y. 529.....	35
Mason v. Libbey.....	90 N. Y. 683.....	13
Masterton v. Vill. of Mt. Vernon..	58 N. Y. 391.....	44
Matter of Allison v. Welde.....	172 N. Y. 421.....	206
Matter of Argus Co.....	188 N. Y. 557, 572.....	216, 262
Matter of Baer.....	147 N. Y. 848.....	127, 138
Matter of Blackstone.....	171 N. Y. 682.....	477
Matter of Brenner.....	170 N. Y. 185.....	208
Matter of Bronson.....	150 N. Y. 1.....	224, 229
Matter of Clark.....	184 N. Y. 222.....	264
Matter of Clinch.....	180 N. Y. 300.....	474, 477
Matter of Cooper.....	98 N. Y. 507.....	176
Matter of Cramer.....	170 N. Y. 271.....	115
Matter of Crane.....	164 N. Y. 71	127
Matter of Daly.....	182 N. Y. 524.....	477
Matter of Davis.....	149 N. Y. 539, 545.....	406
Matter of Dolgeville El. L. & P. Co.	160 N. Y. 500.....	218, 219
Matter of Fayerweather.....	143 N. Y. 114.....	227
Matter of Fitzsimons.....	174 N. Y. 15	284
Matter of Grand Boulevard.....	38 App. Div. 210.....	243
Matter of H., an Attorney.....	87 N. Y. 521	284
Matter of Hewitt.....	181 N. Y. 547.....	477
Matter of Holden.....	126 N. Y. 589.....	540
Matter of Houdayer.....	150 N. Y. 37.....	474, 475
Matter of Jacobs.....	98 N. Y. 98, 108.....	72, 86
Matter of James.....	144 N. Y. 6, 11.....	227
Matter of King.....	168 N. Y. 53.....	284

	PAGE.
Matter of Mayor, etc., of N. Y.....	99 N. Y. 569, 577..... 74, 88
Matter of Ninth Ave. & Fifteenth St.	45 N. Y. 729..... 246
Matter of Palmer.....	40 N. Y. 561..... 406
Matter of Palmer.....	183 N. Y. 233..... 229
Matter of Phalen.....	47 N. Y. S. R. 44; 140 N. Y. 659. 199
Matter of Robinson.....	40 App. Div. 30; 160 N. Y. 448. 540
Matter of Sage.....	70 N. Y. 220..... 224
Matter of Social Democratic Party.	183 N. Y. 442..... 279
Matter of Syracuse, C. & N. Y. }	91 N. Y. 1..... 216
R. R. Co..... }	
Matter of Wheeler.....	2 Abb. Pr. (N. S.) 861..... 290
Matter of Wiley.....	111 App. Div. 590..... 115
Mayor, etc., of N. Y. v. Furze....	3 Hill, 612..... 88
Miller v. Bear.....	3 Paige Ch. 466..... 190
Miller v. Highland Ditch Co.....	87 Cal. 430, 433..... 55
Miller v. Illinois Central R. R. Co..	24 Barb. 312..... 290
Minard v. Syracuse, B. & N. Y. }	71 N. Y. 180..... 162
R. R. Co..... }	
Monatt v. Parker.....	30 La. Ann. 585..... 382
Moncrief v. Ross ..	50 N. Y. 431..... 125
Montecito Valley Co. v. Santa }	144 Cal. 578, 595..... 55
Barbara..... }	
Moody v. Leverich.....	4 Daly, 401..... 234
Moody v. Shaw.....	173 Mass. 375..... 231
Moore v. Baker.....	4 Ind. App. 115..... 464
Moore v. Butler.....	2 Sch. & L. 267..... 463
Moore v. Hart.....	1 Vernon, 261..... 188
Morris v. Stevens..	178 Pa. St. 563, 578..... 294
Mullins v. Siegel-Cooper Co.....	183 N. Y. 129..... 449
Murphy v. Bolger.....	60 Vt. 723..... 489
Murphy v. Ninth Ave. R. R. Co...	6 Misc. Rep. 298; 149 N. Y. 609. 357

N.

Nash v. Sharpe.....	19 Hun, 365..... 44
National Bank of Newburgh v. }	66 N. Y. 271..... 485
Smith..... }	
National Fire Ins. Co. v. McKay..	21 N. Y. 191..... 367
Neass v. Mercer.....	15 Barb. 318..... 406
Nellis v. Nellis.....	99 N. Y. 505..... 115
Newell v. Salmons.....	22 Barb. 644..... 365
New England Mut. Life Ins. Co. }	111 U. S. 138..... 479, 481
v. Woodworth..... }	
N. J. Steel & Iron Co. v. Robinson.	85 App. Div. 512; 178 N. Y. 632. 466
New Orleans v. Stemple.....	175 U. S. 309..... 474
Nicholas v. N. Y. C. & H. R. R. }	89 N. Y. 370..... 162
R. Co..... }	
Nichols v. Lewis.....	15 Conn. 137..... 492

TABLE OF CASES CITED.

xxiii

	PAGE.
Nichols v. Scranton Steel Co.....	137 N. Y. 471..... 19
Norristown v. Moyer.....	67 Pa. St. 355..... 149
Norton v. Mayor, etc., of N. Y....	16 Misc. Rep. 303..... 39
Norwalk H. & L. Co. v. Vernam..	75 Conn. 662..... 489

O.

O'Brien v. Fitzgerald.....	143 N. Y. 377, 381..... 35, 203
O'Reilly v. City of Kingston....	114 N. Y. 439, 448..... 237
Ohio Ins. Co. v. Nunnemacher....	15 Ind. 294..... 291
Otis v. Smith.....	26 Mass. 293..... 490

P.

Paget v. Melcher.....	{ 26 App. Div. 12, 18; 156 N. Y. 399..... 138
Palmer v. N. Y. C. & H. R. R. Co.	112 N. Y. 234..... 317
Parker v. Baker.....	8 Paige, 428..... 4
Parkin v. Thorold	16 Beavan, 59..... 98
Parsell v. Stryker.....	41 N. Y. 480..... 184, 194
Parsons v. Nash.....	8 How. Pr. 454..... 365
Parsons v. N. Y. C. & H. R. R. Co.....	{ 113 N. Y. 355, 363..... 316
Patch v. Keeler.....	27 Vt. 252, 255..... 492
Peck v. Schenectady Ry. Co.	170 N. Y. 298..... 416
People v. Canal Board.....	55 N. Y. 391..... 85
People v. Clough.....	17 Wend. 351..... 415
People v. Everhardt.....	104 N. Y. 591..... 9
People v. Gallagher.....	75 App. Div. 39; 174 N. Y. 505. 15
People v. Gold Run D. & M. Co....	66 Cal. 138..... 55
People v. Lagrille.....	1 Wheeler's Cr. R. 412..... 11
People v. Livingstone.....	47 App. Div. 284..... 416
People v. Mitchell.....	45 Barb. 208..... 406
People v. Molineux.....	168 N. Y. 264..... 8, 10
People v. Sharp.....	107 N. Y. 467..... 9
People v. Stetson.....	4 Barb. 151..... 415
People v. Weaver.....	177 N. Y. 434..... 8, 9
People v. Weldon.....	111 N. Y. 569..... 381
People v. White.....	24 Wend. 520..... 4
People ex rel. Adams v. Westbrook.	89 N. Y. 152, 155..... 394
People ex rel. Hummel v. Trial Term.....	{ 184 N. Y. 30..... 394
People ex rel. Hurlbut v. Bingham.	186 N. Y. 523..... 265
People ex rel. Kenny v. Bingham..	186 N. Y. 522..... 265
People ex rel. Lentilhon v. Coler..	168 N. Y. 6..... 2
People ex rel. Manh. S. Instn. v. Otis.....	{ 90 N. Y. 48, 52..... 80
People ex rel. Metr. St. Ry. Co. v. State Bd. Tax Comrs	{ 174 N. Y. 417..... 208

	PAGE.
People ex rel. Onderdounk v. Supra. } 1 Hill, 195.....	394
Queens Co.	
People ex rel. Reardon v. Bingham. 186 N. Y. 522.	265
People ex rel. Scott v. Pitt 169 N. Y. 521.....	236
People ex rel. Sherwood v. State } 129 N. Y. 360.....	279
Bd. Canvassers.....	
People ex rel. Vil. of Brockport v. } 166 N. Y. 163.....	286
Sutphin.....	
Peri v. N. Y. C. & H. R. R. Co.. 152 N. Y. 521.....	284
Peters v. Bain..... 133 U. S. 670, 695.....	464
Pill v. Brooklyn Heights R. R. Co. 6 Misc. Rep. 267; 148 N. Y. 747. 43	
Platz v. City of Cohoes..... 89 N. Y. 219.....	148
Plimpton v. Bigelow 93 N. Y. 592.....	225
Plummer v. Gloversville Electric Co. 20 App. Div. 527.....	499
Poindexter v. Greenhow..... 114 U. S. 270, 290.....	82, 84
Pumpelly v. Green Bay Co. 13 Wall. 166.	81
Putnam v. Broadway & Seventh } 55 N. Y. 108.....	402
Ave. R. R. Co.	

R.

Radcliff's Exrs. v. Mayor, etc., } 4 N. Y. 195, 206.....	87
of Brooklyn.....	
Rand v. Sage. 102 N. W. Rep. 864.....	61
Rasch v. Noth..... 99 Wis. 285.....	489
Rathbone v. N. Y. C. & H. R. R. } 140 N. Y. 48.....	161
R. Co.	
Reading Trust Co. v. Reading } 187 Pa. St. 262.	294
Iron Works.....	
Real Estate Trust Co. v. Bird..... 90 Md. 229, 245.....	298
Rex v. Murphy..... 6 C. & P. 103.....	148
Rex v. Perkins. 4 C. & P. 537.....	148
Rex v. Young..... 8 C. & P. 645.....	148
Reynolds v. Cook..... 83 Va. 817.....	490
Reynolds v. Orvis..... 7 Cowen, 269.....	470
Rice v. Culver. 172 N. Y. 60, 65.....	456
Robb v. Starkey 2 Carr. & Kirw. 143; 61 Eng. C. L. R. 143.....	11
Robinson v. Chamberlain. 34 N. Y. 389.....	84
Roebbling's Sons Co. v. Fence Co. 130 Ill. 660.....	19
Roehm v. Horst..... 178 U. S. 1, 17, 18.....	19, 26
Romaine v. Onslow..... 24 Weekly Rep. 899.....	189
Rowan v. Kelsey..... 18 Barb. 484.....	490
Rudd v. Cornell 171 N. Y. 114.....	127

S.

Sage v. City of Brooklyn..... 89 N. Y. 189, 195.....	74, 88
St. Peter v. Denison..... 58 N. Y. 416.....	84

TABLE OF CASES CITED.

XXV

	PAGE.
Sampson v. Sampson.....	L. R. (1 Ch. Div. 1896) 630. 111, 119
Sanders v. Saxton.....	182 N. Y. 477, 478..... 18
Schmitt v. Schnell.....	14 Ohio C. C. 153..... 19
Schultze v. Goodstein.....	180 N. Y. 248..... 412
Schutz v. Union Ry. Co. of N. Y. City.....	181 N. Y. 33..... 322
Schwander v. Birge.....	46 Hun, 66..... 322
Sellick v. Hall.....	47 Conn. 260..... 56
Seneca Nation of Indians v. Christie.	126 N. Y. 122; 162 U. S. 283.... 496
Seneca Nation of Indians v. Lehlly..	55 Hun, 88..... 499
Seymour v. De Lancey.....	6 Johns. Ch. 223..... 182
Seymour v. McKinstry.....	106 N. Y. 230, 239..... 374
Shadwell v. Shadwell.....	30 L. J. (C. P.) 145; 9 C. B (N. S.) 159..... 181, 187
Shakespeare v. Markham.....	10 Hun, 311; 72 N. Y. 400.. 184, 196
Sharp v. Erie R. R. Co.....	184 N. Y. 100.. 401
Sheeron v. Coney Island & B. R. R. Co.....	89 App. Div. 388..... 354
Sherry v. Frecking.....	4 Duer, 452..... 489
Shipman v. Furniss.....	69 Ala. 555..... 381
Shoe & Leather Bank v. Thompson.	18 Abb. Pr. 413..... 441
Simonin v. N. Y., L. E. & W. R. R. Co.....	36 Hun, 214..... 44
Sipple v. State of N. Y.....	99 N. Y. 284..... 83
Sloggy v. Dilworth..	38 Minn. 179..... 57
Smith v. Sleap.....	1 Carr. & Kirw. 48..... 11
Smith v. Smith.....	125 N. Y. 224..... 184
Southwick v. Southwick.....	49 N. Y. 510, 517..... 406
Speer v. Phoenix Mut. L. Ins. Co..	36 Hun, 322..... 24, 26
Spence v. Ham.....	27 App. Div. 879; 163 N. Y. 220. 412
Spencer v. Duckworth.....	L. R. (18 Ch. Div.) 634..... 111
Sperry v. Miller.....	16 N. Y. 407..... 432
Sprague v. Cochran.....	144 N. Y. 104..... 184
Stafford v. Van Rensselaer.....	9 Cow. 316..... 374
Stanford v. McGill..	6 N. Dak. 536..... 19
Stanton v. Miller.....	58 N. Y. 192..... 184
State v. Breckenridge.....	67 Iowa, 204..... 11
State v. Cole.....	19 Wis. 129, 134..... 11
State v. Saunders.....	68 Iowa, 371..... 11
State v. Smith.....	48 Vt. 290..... 294
State Tax on Foreign Held Bonds..	15 Wall. 300..... 474
Stedman v. Smith.....	92 Eng. C. L. 1..... 489
Steers v. Liverpool, N. Y. & P. S. S. Co.....	57 N. Y. 1..... 155, 156
Stemmler v. Mayor, etc., of N. Y..	179 N. Y. 482..... 176
Stokes v. Stokes.....	155 N. Y. 590..... 192
Sullivan v. Legraves.....	2 Str. Cases, 695..... 490

		PAGE.
Sultz v. Mut. Reserve Fund L. Assn.	145 N. Y. 568.	479, 481
Swart v. Boughton	85 Hun, 281.	202
Sweet v. Rechel	159 U. S. 380, 393.	74

T.

Tennessee v. Whitworth	117 U. S. 129.	237
Terry v. Jewett	78 N. Y. 338.	316
Terwilliger v. Wands	17 N. Y. 54.	443
Thellusson v. Woodford	13 Ves. 200, 220.	461, 463
Theobald v. Smith	103 App. Div. 200.	134
Thomas v. Scutt	127 N. Y. 133.	338
Thomas v. Union Ry. Co.	18 App. Div. 185.	44
Thomson v. Poor	147 N. Y. 402, 409.	511
Thomson v. Tracy	60 N. Y. 31.	394
Thorpe v. Brumfitt	L. R. (8 Ch. App.) 650.	51
Titman v. Mayor, etc., of N. Y.	57 Hun, 469; 125 N. Y. 729.	39
Tobias v. Harland	4 Wend. 537.	442
Todd v. Gamble	148 N. Y. 382.	251
Todd v. Weber	95 N. Y. 181.	186
Toplitz v. Bauer	161 N. Y. 325, 333.	511
Tower v. Utica & Schenectady R. Co.	7 Hill, 47.	402
Trenton, etc., Ins. Co. v. Perrine ..	23 N. J. Law, 403.	441
Tyson v. Blake	22 N. Y. 558.	113

U.

Ullman v. Cameron.	92 App. Div. 81.	345
Unexcelled F. W. Co. v. Polites	130 Pa. St. 536.	19
Union Assoc. Press v. Heath.	49 App. Div. 247.	441

V.

Vanderzee v. Slingerland	103 N. Y. 47.	114
Van Schaack v. Leonard	164 Ill. 602.	464
Van Wycklen v. City of Brooklyn ..	118 N. Y. 424.	322
Vil. of Mechanicville v. Stillwater } & M. St. Ry. Co.	35 Misc. Rep. 513; 174 N. Y. 507.	309
Vrooman v. Jackson	6 Hun, 326.	489

W.

Waldie v. Brooklyn Heights R. R. Co.	78 App. Div. 557.	44
Wankford v. Fotherley	2 Vernon, 322.	188
Ward v. Petrie	157 N. Y. 301, 311.	344
Waterloo W. Mfg. Co. v. Shanahan ..	128 N. Y. 345, 362.	87
Way v. American Grease Co.	60 N. J. Eq. 263, 269.	292

TABLE OF CASES CITED.

xxvii

	PAGE.
Webb v. Hughes.....	L. R. (10 Eq.) 281..... 98
Weeks v. O'Brien.....	141 N. Y. 199, 208..... 18
Wendt v. Walsh.....	164 N. Y. 154..... 345, 346
West Chicago St. R. R. Co. v. } Marks.....	182 Ill. 15 355
Westcott v. Fargo	61 N. Y. 542 155, 156, 157
Wheeler v. Oceanic Steam Nav. Co.	72 Hun, 5; 149 N. Y. 576... 155, 158
Wheeler v. Oceanic Steam Nav. Co.	125 N. Y. 155, 160..... 163
Whitman v. Aitken.....	L. R. (2 Eq.) 414..... 112
Whitney v. State of N. Y.	96 N. Y. 240 245
Wilder v. Metr. St. Ry. Co.	10 App. Div. 364; 161 N. Y. 665. 352
Williams v. City of Brooklyn.....	83 App. Div. 539..... 449
Williams v. Jones	166 N. Y. 522, 532..... 108
Williams v. Montgomery.. ..	148 N. Y. 519..... 262
Williams v. Thorn.....	70 N. Y. 270, 278..... 346
Willis v. Black.....	4 Russ. 170..... 189
Willis v. Fairchild.....	19 J. & S. 405..... 202
Wilmarth v. Woodcock.....	58 Mich. 482, 485..... 489
Windmuller v. Pope.....	107 N. Y. 674..... 19, 26
Wines v. Mayor, etc., of N. Y.....	70 N. Y. 613..... 176
Winne v. Winne.....	166 N. Y. 263..... 184, 195
Wisner v. Consolidated Fruit Jar } Co.....	25 App. Div. 362..... 202
Wisner v. Ocumpaugh.. ..	71 N. Y. 113 493
Woodhull v. Rosenthal.....	61 N. Y. 382, 389..... 492
Woodman v. State of N. Y.....	127 N. Y. 397..... 83
Woodruff v. N. B. G. M. Co.	8 Sawy. Cir. Ct. 628..... 50
Wyman v. Halstead.....	109 U. S. 654 480
Wynehamer v. People.....	13 N. Y. 378, 401..... 72, 80

Z.

Zimmer v. N. Y. C. & H. R. R. R. } Co.....	187 N. Y. 460..... 158, 162
Zimmerman v. Lebo.....	151 Pa. St. 345..... 464

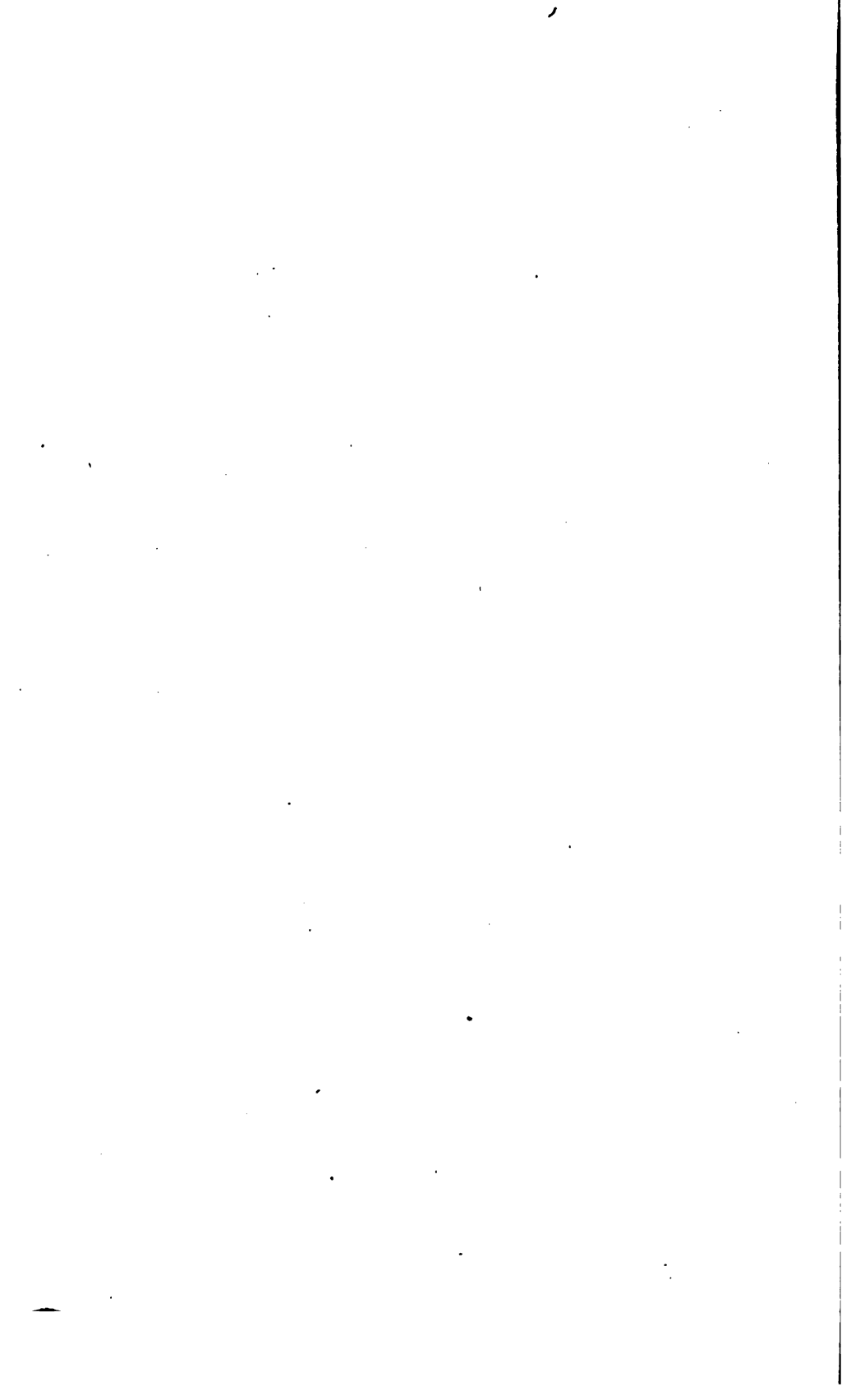


TABLE OF CASES

AFFECTED BY DECISIONS REPORTED IN THIS VOLUME.

A F F I R M E D .		PAGE.
Allen v. Pierson	112 App. Div. 901.....	546
Alt v. Doscher.....	102 App. Div. 344.....	566
Anglin v. American Constr. & Tr. } Co.....	109 App. Div. 237	590
Arlington Co. v. Colonial Assur. } Co.....	109 App. Div. 903.....	570
Bach v. Kidansky.....	106 App. Div. 502.....	368
Barnes v. Long Island R. E. Ex- } change & Inv. Co.	107 App. Div. 623.....	550
Bayer v. Lugar.....	106 App. Div. 522.....	569
Beetson v. Beetson.....	108 App. Div. 366	456
Bier v. Bash.	107 App. Div. 429.....	565
Birkett v. Postal Telegraph-Cable } Co.....	107 App. Div. 115.....	591
Bowers v. Male.....	111 App. Div. 209	28
Bradley v. Bridge.....	101 App. Div. 611.....	518
Brandt v. City of New York.....	110 App. Div. 396.....	599
Brevoort Real Estate Co. v. Kings- } ton.....	114 App. Div. 904	584
Bronk v. Binghamton R. R. Co....	111 App. Div. 910	576
Buffalo Loan T. & S. D. Co. v. } Carstensen	107 App. Div. 128.....	606
Burger v. Snare & Triest Co	105 App. Div. 636.....	610
Butler v. Frontier Telephone Co..	109 App. Div. 217.....	486
Butler v. Supreme Council Am. } L. of H	105 App. Div. 164.....	514
Callahan v. Godwin	110 App. Div. 889.....	578
Calhoun v. Buck.....	108 App. Div. 366.....	598
Carolan v. Yoran.....	104 App. Div. 488.....	575
Case v. N. Y. Mutual S. & L. Assn.	99 App. Div. 624.....	570
Chamberlain v. Home Ins. Co.....	108 App. Div. 356.....	601
Cholet v. City of Syracuse.....	111 App. Div. 903.....	520
Cody v. Hadcox.....	109 App. Div. 912.....	520
Coley v. Tallman.....	107 App. Div. 445.....	569
Conger v. Eusler.....	110 App. Div. 889.....	588
Conlon v. Mission of the Immacu- } late Virgin, etc.....	104 App. Div. 680.....	613

	PAGE
County of Jefferson v. County of } Oswego.....	102 App. Div. 232..... 555
Cousino v. Watertown Paper Co...	105 App. Div. 625..... 513
Donohue v. American Bridge Co...	111 App. Div. 908..... 609
Doon v. American Surety Co.....	110 App. Div. 215..... 598
Dougherty v. Neville.....	108 App. Div. 89..... 578
Dresser v. Dresser.....	104 App. Div. 617..... 568
Ely v. Dumont.	105 App. Div. 640..... 552
Erwin v. Erie R. R. Co.....	98 App. Div. 402..... 550
Far Rockaway Bank v. Smith.....	110 App. Div. 917..... 484
Finn v. Smith.....	107 App. Div. 630..... 465
Flagler v. Devlin.....	109 App. Div. 904..... 589
Fox v. Hopkins.....	84 App. Div. 632..... 515
Fromer v. Ottenberg.....	105 App. Div. 640..... 561
Fuehrman v. McCord.....	107 App. Div. 12..... 566
Gehrhardt v. Schwartz.....	102 App. Div. 389..... 574
Genet v. D. & H. Canal Co.....	110 App. Div. 867..... 423
Gilliam v. Guaranty Trust Co.....	111 App. Div. 656..... 127
Gluckman v. Strauch.....	99 App. Div. 361..... 560
Grant v. Pratt & Lambert.....	110 App. Div. 867..... 611
Grossman v. Consolidated Gas Co..	114 App. Div. 242..... 541
Hatton v. Supreme Council C. B. L.	110 App. Div. 918..... 577
Herzog Teleseme Co. v. Majestic } Hotel Co.....	105 App. Div. 642..... 563
Hood v. Lehigh Valley R. R. Co...	109 App. Div. 418..... 517
Horning v. Hudson River Tele- } phone Co.....	111 App. Div. 122..... 532
Horrmann v. Furgueson.....	112 App. Div. 920..... 544
Howell v. Hancock Mut. L. Ins. Co.	107 App. Div. 200..... 556
Hudson & Manhattan R. R. Co. } v. Wendell.....	112 App. Div. 822..... 585
Hudson River Water Power Co. } v. Glens Falls P. Cement Co...	109 App. Div. 919..... 597
Irving v. Bruen.....	110 App. Div. 558..... 605
Jacobs v. N. Y. C. & H. R. R. R. Co.	107 App. Div. 184..... 586
Jacobson v. Stone.....	110 App. Div. 919..... 608
Jemison v. Bell Telephone Co.....	109 App. Div. 911..... 493
Jennings v. Supreme Council L. } A. B. Assn.....	108 App. Div. 366..... 571
Johnston v. Long Island Inv. & } Impr. Co.....	104 App. Div. 619..... 553
Kearny v. Metropolitan Trust Co...	110 App. Div. 236..... 611
Keefe v. N. Y. C. & H. R. R. R. Co.	109 App. Div. 180..... 594
Kremer v. New York Edison Co...	102 App. Div. 433..... 557
Kuehn v. Syracuse Rapid Transit } Co.....	104 App. Div. 580..... 567
Lautz v. Williams.....	102 App. Div. 619..... 551

TABLE OF CASES AFFECTED.

xxxii

	PAGE.
Lawrence v. McKelvey.....	106 App. Div. 612..... 588
Levy v. Popper.....	106 App. Div. 894..... 600
McCarg v. Burr.....	106 App. Div. 275..... 467
Maldoon v. Jefferson Power Co....	105 App. Div. 625..... 518
March v. March.....	104 App. Div. 680..... 99
Matter of Adolph.....	102 App. Div. 371..... 517
Matter of Gibbs v. O'Brien.....	115 App. Div. —..... 513
Matter of Gordon.....	114 App. Div. 202..... 471
Matter of Hanford.....	113 App. Div. 894..... 547
Matter of Hull.....	112 App. Div. 906..... 585
Matter of Hull.....	111 App. Div. 322..... 586
Matter of Keogh.....	112 App. Div. 414..... 544
Matter of Lord.....	111 App. Div. 152..... 549
Matter of Mayor, etc., of New York.	114 App. Div. 904..... 237
Matter of Morgan v. Furey.....	114 App. Div. 127..... 202
Matter of O'Rourke v. Biingham....	113 App. Div. 919..... 535
Matter of Pillsbury.....	113 App. Div. 898..... 545
Matter of Schroeder.....	{ 113 App. Div. 204; 114 App. Div. 906..... 537
Matter of Strong.....	111 App. Div. 281..... 584
Matter of Webster.....	113 App. Div. 888..... 536
Matter of Webster v. Purcell.....	106 App. Div. 360..... 549
Mayor, etc., of New York v. H. B., } M. & F. Ry. Co..... }	100 App. Div. 257..... 304
Mengle v. McClintic-Marsha } Constr. Co..... }	107 App. Div. 624..... 564
Merker v. Bultman.....	110 App. Div. 689..... 573
Metropolitan Milk & Cream Co. v. } City of New York..... }	113 App. Div. 377..... 533
Michigan Savings Bank v. Coy. } Hunt & Co..... }	111 App. Div. 914..... 607
Michigan Savings Bank v. Hubbs..	111 App. Div. 915..... 607
Michigan Savings Bank v. Millar...	110 App. Div. 670..... 606
Middleton v. Farrell.....	110 App. Div. 889..... 572
Millage v. Woodward.....	105 App. Div. 627..... 252
Motzing v. Excelsior Brewing Co..	107 App. Div. 275..... 577
Myer v. Abbett.....	105 App. Div. 587..... 519
Nester v. Colter.....	98 App. Div. 634..... 568
Neubrech v. Lawrence.....	101 App. Div. 609..... 557
New York Brick & Paving Co. v. } Bronx Borough of New York.. }	105 App. Div. 623..... 559
Niles v. Sire.....	108 App. Div. 366..... 573
Nunnally v. New Yorker Staats- } Zeitung..... }	111 App. Div. 482..... 532
Nunnally v. Tribune Association...	111 App. Div. 485..... 533
O'Shaughnessy v. Aetna Life Ins. Co.	105 App. Div. 625..... 589
Palmer v. Hickory Grove Cemetery.	106 App. Div. 613..... 593

	PAGE.
Peace v. Wilson.....	110 App. Div. 887..... 403
People v. Ellenbogen.....	114 App. Div. 182..... 608
People v. Mannasovitch.....	115 App. Div. —..... 592
People v. Rogers.....	112 App. Div. 921..... 516
People v. Tompkins.....	114 App. Div. 912..... 418
People ex rel. City of Geneva v. Geneva, W. S. F. & C. L. Co. Tr. Co.....	112 App. Div. 581..... 516
People ex rel. City of New York v. Lyon.....	114 App. Div. 588..... 545
People ex rel. Hurlbut v. Bingham.....	118 App. Div. 921..... 588
People ex rel. Kenny v. Bingham.....	App. Div. 2d Dept. June 22, 1906..... 539
People ex rel. Livingston v. Wyatt.....	118 App. Div. 111..... 883
People ex rel. N. Y. Juvenile Asylum v. O'Donnell.....	114 App. Div. 902..... 585
People ex rel. Reardon v. Bingham.....	App. Div. 2d Dept. June 22, 1906..... 539
People ex rel. Sixty Wall Street v. Kelsey.....	114 App. Div. 909..... 548
People ex rel. Walters v. Lewis.....	111 App. Div. 375..... 588
Percival v. Percival.....	106 App. Div. 111..... 587
Peters v. Slattey.....	106 App. Div. 612..... 574
Pierle v. Smith.....	109 App. Div. 911..... 602
Platt v. Elias.....	108 App. Div. 365..... 374
Pluckham v. American Bridge Co.....	104 App. Div. 404..... 561
Porter v. Preferred Accident Insurance Co.....	109 App. Div. 103..... 599
Pratt, Hurst & Co. v. Tailer.....	114 App. Div. 574..... 417
Preston v. Brinley.....	106 App. Div. 598..... 515
Pruyn v. Guayaquil v. Quito Ry. Co.....	118 App. Div. 894, 895..... 583
Richman v. Consolidated Gas Co.....	114 App. Div. 216..... 209
Roach v. City of New York.....	105 App. Div. 642..... 592
Rockefeller v. Lamora.....	106 App. Div. 345..... 567
Rogers v. City of Binghamton.....	101 App. Div. 352..... 595
Rogers v. City of Rome.....	108 App. Div. 358..... 610
Ross v. Bayer-Gardner-Himes Co.....	108 App. Div. 366..... 612
Russell v. N. Y. C. & H. R. R. R. Co.....	105 App. Div. 686..... 519
St. Regis Paper Co. v. Tonawanda Board & Paper Co.....	107 App. Div. 90..... 563
Sandiford v. Town of Hempstead.....	97 App. Div. 163..... 554
Serviss v. International Paper Co.....	105 App. Div. 626..... 562
Shane v. National Biscuit Co.....	102 App. Div. 188..... 514
Silverman v. Minsky.....	109 App. Div. 1..... 576
Smith v. Hirsch.....	103 App. Div. 609..... 590
Smith v. Marsh.....	111 App. Div. 913..... 605

TABLE OF CASES AFFECTED.

xxxiii

		PAGE.
Starkweather v. Sundstrom.....	108 App. Div. 856.....	591
Swenson v. Wilson & Baillie Mfg. Co.....	102 App. Div. 477.....	555
Swift v. American Exchange Nat. Bank.....	103 App. Div. 610.....	521
Theall v. Village of Port Chester..	110 App. Div. 776.....	602
Tittle v. Van Valkenburg.....	75 App. Div. 69.....	597
Triest v. Vassar.....	107 App. Div. 624.....	565
Tschetlinian v. City Trust Co.....	110 App. Div. 916.....	493
Turck v. Robinson.....	105 App. Div. 627.....	571
Twaddell v. Weidler.....	109 App. Div. 444.....	601
Ullman v. Cameron.....	105 App. Div. 159.....	389
United States Leather Co. v. Aldrich.....	75 App. Div. 616.....	558
Waite v. Greenleaf.....	96 App. Div. 689.....	558
Walter v. Rafalsky.....	118 App. Div. 228.....	534
Wanamaker v. Powers.....	103 App. Div. 485.....	563
Warren v. Parkhurst.....	103 App. Div. 239.....	45
Willard v. Welch.....	94 App. Div. 179.....	564
Wilson v. Mandeville.....	108 App. Div. 358.....	604
Windmuller v. Standard D. & D. Co.	106 App. Div. 246.....	572

REVERSED.

American Guild v. Damon.....	107 App. Div. 140.....	380
Arnot v. Union Salt Co.....	109 App. Div. 433.....	501
Bracher v. Equitable Life Assur. Society.....	103 App. Div. 269.....	62
Brinck v. North German Lloyd S. S. Co.....	104 App. Div. 619.....	523
Broadwell v. Conover.....	108 App. Div. 359.....	429
Butler v. Village of Oxford.....	101 App. Div. 611.....	444
Butler v. Wright.....	103 App. Div. 468.....	259
Cooper v. Payne.....	103 App. Div. 118.....	334
Cranch v. Brooklyn Heights R. R. Co.....	107 App. Div. 341.....	310
Easthampton L. & C. Co. v. Worthington.....	108 App. Div. 355.....	407
Easthampton L. & C. Co. v. Worthington.....	108 App. Div. 355.....	581
Eastman Kodak Co. v. Kleinhans..	102 App. Div. 619.....	613
Haddam Granite Co. v. Brooklyn Heights R. R. Co.....	107 App. Div. 616.....	247
Johnson v. City of New York.....	109 App. Div. 821.....	139
Kelly v. Security Mutual Life Ins. Co.....	106 App. Div. 352.....	16
Kronold v. City of New York.....	96 App. Div. 636.....	40
Leo v. McCormack.....	105 App. Div. 642.....	380

		PAGE.
Litchfield v. Bond.....	105 App. Div. 229.....	66
McKnight v. City of New York...	98 App. Div. 622.....	35
Martin v. Babcock & Wilcox Co...	109 App. Div. 16	451
Matter of Cooley.....	118 App. Div. 388.....	220
Matter of Speranza.....	114 App. Div. 913.....	280
Matter of Westchester Trust Co...	114 App. Div. 856.....	215
People v. Dolan.....	111 App. Div. 600.....	4
People ex rel. Hummel v. Reardon.	112 App. Div. 866.....	164
People ex rel. Keim v. Desmond. .	111 App. Div. 757.....	233
People ex rel. Quinn v. Voorhis...	115 App. Div. 118.....	263
Phalen v. United States Trust Co..	108 App. Div. 365	178
Rand v. Iowa Central Ry. Co.....	96 App. Div. 418.....	58
Reporters' Assn. v. Sun Printing } & Pub. Assn.....	112 App. Div. 246.....	437
St. Regis Paper Co. v. Santa Clara } Paper Co.....	105 App. Div. 341.....	89
Stenger v. Buffalo Union Furnace } Co.....	107 App. Div. 621.....	323
Stokes v. Continental Trust Co.....	99 App. Div. 377.....	285
Tewes v. North German Lloyd } S. S. Co.....	104 App. Div. 619.....	151
Tewes v. North German Lloyd } S. S. Co.....	104 App. Div. 619.....	525
Tietz v. International Ry. Co. ...	107 App. Div. 620.....	347
Tyson v. J. H. Bauland Co.....	106 App. Div. 612	397
Welle v. Celluloid Co.....	105 App. Div. 642.....	319

MODIFIED.

Boisnot v. Wilson.....	109 App. Div. 569.....	593
Matter of Pitney	113 App. Div. 845	540
Molloy v. City of New Rochelle...	110 App. Div. 895 ..	603
People ex rel. Troy Press Co. v. } Common Council City of Troy. }	114 App. Div. 354.....	548
Weddigan v. Whiting.....	111 App. Div. 907.....	596

APPEAL DISMISSED.

Ebling Brewing Co. v. New York } City Interborough Ry. Co.....	112 App. Div. 912	524
Eighth Ward Bank of Brooklyn } v. McLoughlin.....	113 App. Div. 750	527
Fox v. New York City Interbor- } ough Ry. Co.....	112 App. Div. 832	524
Gein v. Little	102 App. Div. 614.....	528
Goreth v. Shipherd.	92 App. Div. 611.....	553
King v. German-American Bank } of Buffalo	102 App. Div. 619.....	530

TABLE OF CASES AFFECTED.

xxxv

PAGE.

Knickerbocker Trust Co. v.)	111 App. Div. 812	527
Oneonta C. & R. S. Ry. Co. }		
Matter of Payne v. O'Brien.....	114 App. Div. 890	1
Matter of Pendleton v. O'Brien.....	114 App. Div. 890	1
Matter of Sherrill v. O'Brien.	114 App. Div. 890	1
Matter of Waterman	112 App. Div. 313	584
Matter of Weeks v. Coe.....	112 App. Div. 888	581
Reinheimer v. Cunningham	113 App. Div. 921	595
Scott v. Spencer.....	106 App. Div. 614	531
Smith v. London Assur. Corpn.....	114 App. Div. 868	541

MOTION TO DISMISS APPEAL DENIED.

Blun v. Mayer. (No. 1)	113 App. Div. 242	542
Blun v. Mayer. (No. 2).....	113 App. Div. 247.	542
Brechtlein v. Greenwood Cemetery.	113 App. Div. 911	500
Kuelling v. Roderick Lean Manu-)	113 App. Div. 891	579
facturing Co..... }		
People v. Nelson.....	Supreme Court, New York County, April 9, 1906.....	554
People v. Strolla.....	Supreme Court, New York County, April 30, 1906	526
People ex rel. Hurlbut v. Bingham.	113 App. Div. 921.....	523
People ex rel. Kenny v. Bingham.	Appellate Division, 2nd Dept., June 22, 1906.....	522
People ex rel. Reardon v. Bing-)	Appellate Division, 2nd Dept., June 22, 1906.....	522
ham. }		
Simonson v. Mendham.....	115 App. Div. —.....	579
Snyder v. Monroe Eckstein Brew-)	107 App. Div. 328.....	529
ing Co..... }		

APPEAL WITHDRAWN.

Keating v. Manhattan Ry. Co.....	110 App. Div. 108.. . . .	614
----------------------------------	---------------------------	-----

MOTION TO WITHDRAW APPEAL GRANTED CONDITIONALLY.

Lord v. Citizens' Steamboat Com-)	106 App. Div. 610.....	604
pany		
Martin v. Gavigan.....	107 App. Div. 279.....	559

TABLE OF CASES

DISTINGUISHED, ETC., IN OPINIONS REPORTED IN THIS VOLUME.

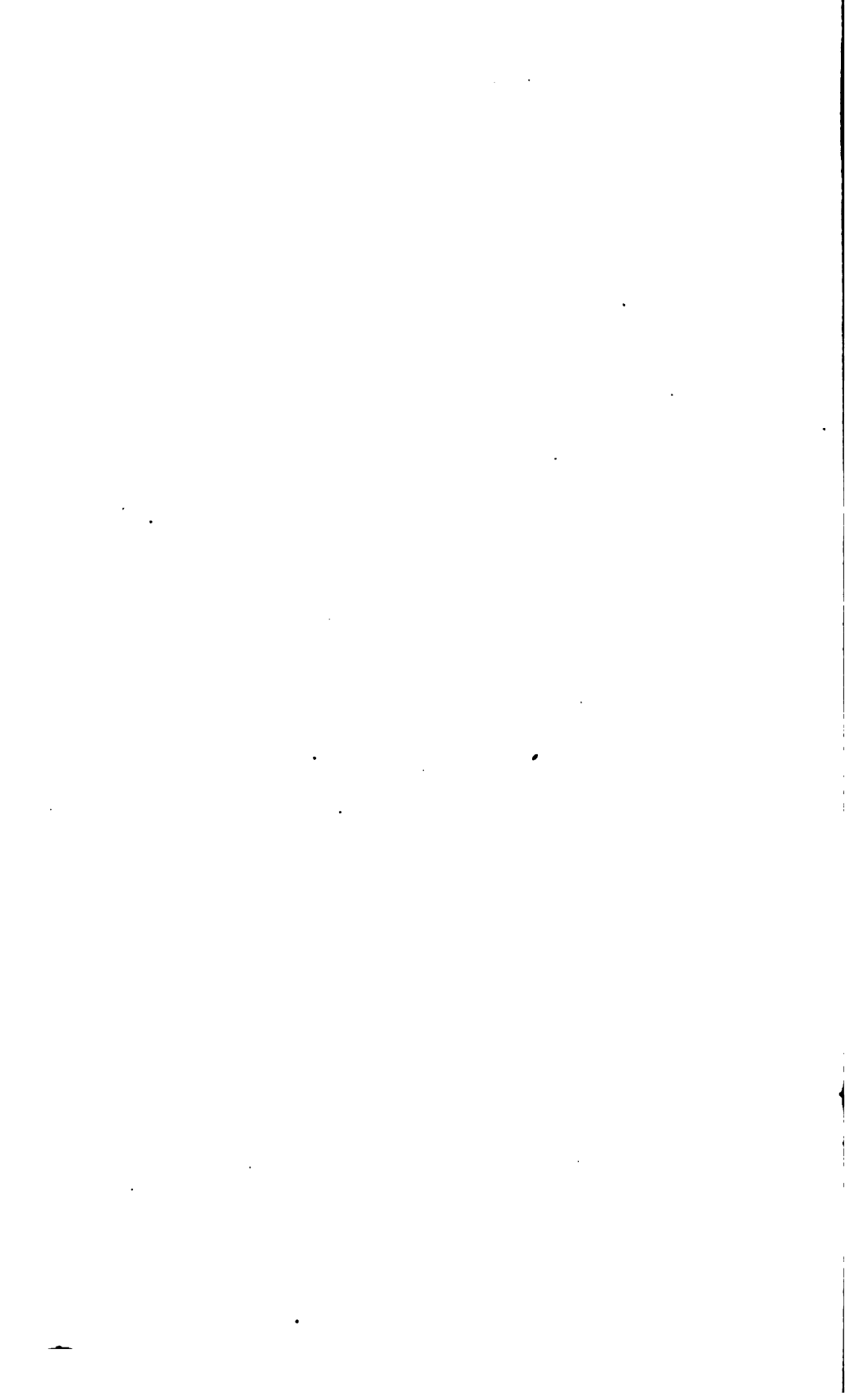
	PAGE.
Ballou v. State of N. Y.....	111 N. Y. 500, distinguished.... 83
Barnes v. City of Brooklyn.....	22 App. Div. 520, distinguished. 39
Beecher v. Long Island R. R. Co...	161 N. Y. 222, distinguished.... 317
Blackstone v. Miller.	188 U. S. 189, distinguished .. 475
Boston & Albany R. R. Co. v. } O'Reilly.....	158 U. S. 334, distinguished.... 44
Bradley v. Andrews.....	51 Vt. 530, distinguished... 150
Bunnell v. Stern.....	122 N. Y. 541, distinguished ... 401
Castle v. Duryee.....	1 Abb. Ct. App. Dec. 327, distin- guished..... 150
Chipman v. Palmer.....	77 N. Y. 51, distinguished..... 55
Clark v. Eighth Ave. R. R. Co....	36 N. Y. 135, distinguished.... 333
Clune v. Brooklyn Elev. R. R. Co..	15 N. Y. S. R. 825, distinguished. 333
Craighead v. Brooklyn City R. R. } Co.....	123 N. Y. 391, distinguished.... 356
Crapo v. City of Syracuse.....	183 N. Y. 395, distinguished.... 39
Craven v. International Ry. Co....	100 App. Div. 157, distinguished. 353
Durr v. N. Y. C. & H. R. R. Co. 184	N. Y. 320, distinguished.... 449
Finley v. Bent.....	95 N. Y. 364, approved..... 117
Fordham v. Gouverneur Village...	160 N. Y. 541, distinguished.... 449
Gall v. Gall.....	138 N. Y. 675, distinguished.... 185
Gatens v. Metr. St. Ry. Co....	89 App. Div. 311, distinguished.. 353
Gilmour v. Colcord.....	183 N. Y. 342, explained.... 466
Graham v. Manhattan Ry. Co. ...	149 N. Y. 336, distinguished.... 354
Gray v. Metr. St. R. Co.....	39 App. Div. 536, distinguished.. 354
Gray v. Portland Bank.....	3 Mass. 364, approved. 291
Guille v. Swan.....	19 Johns. 381, distinguished.... 150
Hallett v. Thompson ...	5 Paige, 583, approved..... 346
Henderson v. Nassau Elec. R. R. Co.	46 App. Div. 280, distinguished.. 354
Ide v. Brown.....	178 N. Y. 26, distinguished.... 185
Keyes v. Little York Gold W. & } W. Co.....	53 Cal. 724, discussed 53
King v. Sun P. & P. Co.....	84 App. Div. 310; 179 N. Y. 600, distinguished..... 442
Langan v. Supreme Council Am. } L. of H.....	174 N. Y. 266, approved... 20

xxxviii TABLE OF CASES DISTINGUISHED.

	PAGE.
Lansing v. Coney Island & B. R. } R. Co.	16 App. Div. 146, distinguished. 354
Lehr v. Steinway & H. P. R. R. Co.	118 N. Y. 556, distinguished. 354
Lent v. N. Y. C. & H. R. R. R. Co.	120 N. Y. 467, distinguished. 352
Little Schuylkill Nav. Co. v. } Richards' Admr.	57 Pa. St. 142, distinguished. 57
Lucas v. Metr. St. Ry. Co.	56 App. Div. 405, distinguished. 353
McCord v. People	46 N. Y. 470, discussed. 415
McGuire v. Spence.	91 N. Y. 303, distinguished. 150
McKinstry v. Sanders.	2 T. & C. 181, distinguished. 108
Mahaney v. Carr.	175 N. Y. 454, distinguished. 185
Marks v. Long Island R. R. Co. ...	14 Daly, 61, distinguished. 44
Masterton v. Vill. of Mt. Vernon. ...	58 N. Y. 891, distinguished. 44
Matter of Bronson.	150 N. Y. 1, distinguished. 229
Matter of Clinch.	180 N. Y. 300, distinguished. 477
Matter of Daly.	182 N. Y. 524, distinguished. 477
Matter of Dolgeville El. L. & P. Co.	160 N. Y. 500, discussed. 219
Matter of Hewitt.	181 N. Y. 547, distinguished. 477
Matter of Houdayer.	150 N. Y. 37, distinguished. 476
Matter of Palmer.	183 N. Y. 238, distinguished. 230
Mayor, etc., of New York v. Furze.	3 Hill, 612, distinguished. 83
Moody v. Shaw.	173 Mass. 375, distinguished. 231
Mullins v. Siegel-Cooper Co.	183 N. Y. 129, distinguished. 449
Murphy v. Ninth Ave. R. R. } Co.	6 Misc. Rep. 298; 149 N. Y. 609, distinguished. 357
Norton v. Mayor, etc., of N. Y.	16 Misc. Rep. 303, distinguished. 39
Palmer v. N. Y. C. & H. R. R. R. Co.	112 N. Y. 234, distinguished. 317
People v. Weaver.	177 N. Y. 434, distinguished. 9
people ex rel. Sherwood v. State } Bd. of Canvassers.	129 N. Y. 360, distinguished. 279
Poindexter v. Greenhow.	114 U. S. 270, approved. 83
Putnam v. Broadway & Seventh } Ave. R. R. Co.	55 N. Y. 108, distinguished. 402
Rand v. Sage.	102 N. W. Rep. 864, distinguished. 61
Sellick v. Hall.	47 Conn. 260, distinguished. 56
Sharp v. Erie R. R. Co.	184 N. Y. 100, distinguished. 401
Sheeron v. Coney Island & B. R. } R. Co.	89 App. Div. 338, distinguished. 354
Sipple v. State of N. Y.	99 N. Y. 284, distinguished. 83
Sloggy v. Dilworth.	38 Minn. 179, distinguished. 57
Thomas v. Scutt.	127 N. Y. 133, approved. 338
Titman v. Mayor, etc., of N. Y. ...	57 Hun, 469; 125 N. Y. 729, distinguished. 39
Tower v. Utica & Schenectady } R. R. Co.	7 Hill, 47, distinguished. 402

TABLE OF CASES DISTINGUISHED. xxxix

	PAGE.
West Chicago St. R. R. Co. v. } Marks. }	182 Ill. 15, distinguished..... 356
Westcott v. Fargo.....	61 N. Y. 542, discussed. 155
Wilder v. Metr. St. Ry. Co.	{ 10 App. Div. 364; 161 N. Y. 665, distinguished..... 352
Williams v. City of Brooklyn.....	33 App. Div. 539, distinguished. 449
Woodman v. State of N. Y....	127 N. Y. 397, distinguished.... 88



CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

COMMENCING OCTOBER 1, 1906.

In the Matter of the Application of WILLIAM L. SHERRILL et al., Appellants, for a Writ of Mandamus against JOHN F. O'BRIEN, as Secretary of State, Respondent.

In the Matter of the Application of WALTER PENDLETON, Appellant, for a Writ of Mandamus against JOHN F. O'BRIEN, as Secretary of State, Respondent.

In the Matter of the Application of GEORGE E. PAYNE et al., Appellants, for a Writ of Mandamus against JOHN F. O'BRIEN, as Secretary of State, Respondent.

APPEAL — LEGISLATIVE APPORTIONMENT — CONST. ART. 3, § 5. The right of the Court of Appeals to review the action of the Supreme Court in cases relating to a legislative apportionment proceeds from its general appellate jurisdiction; in the absence of express legislative authority it cannot, in a proceeding attacking the validity of an apportionment, entertain an appeal from an order of the Appellate Division affirming an order of the Special Term denying an application for a common-law writ of mandamus, unless it affirmatively appears on the face of the order that it was not made in the exercise of discretion; and the jurisdiction of the court should not be strained when the effect of an adverse decision might be to throw a general election about to be held into inextricable confusion and chaos.

Matter of Sherrill v. O'Brien, 114 App. Div. 890, appeal dismissed.

Matter of Pendleton v. O'Brien, 114 App. Div. 890, appeal dismissed.

Matter of Payne v. O'Brien, 114 App. Div. 890, appeal dismissed.

(Argued September 28, 1906; decided October 1, 1906.)

APPEAL in each of the above-entitled proceedings from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 12, 1906, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus directing the secretary of state to transmit to the county clerk of each county, and to the board of elections of the city of New York, election notices as provided by section 5 of the Election Law, and that he embrace in said election notices the number of senators and members of assembly to be voted for at the election to be held on November 6, 1906, required and allowed to be voted for under the apportionment contained in the Constitution of this state, and not according to the apportionment contained in chapter 431 of the Laws of 1906.

Elon R. Brown for William L. Sherrill et al., appellants.

Eugene Lamb Richards, Jr., and *William Allaire Shortt* for Walter Pendleton, appellant.

Edward B. Whitney and *Robert Grier Monroe* for George E. Payno et al., appellants.

Julius M. Mayer, Attorney-General (*Merton E. Lewis* and *James G. Graham* of counsel), for respondent.

Per Curiam. The appeal in each of the above-entitled proceedings is from an order of the Appellate Division affirming an order of the Special Term denying an application for a common-law writ of mandamus.

It has long been the law that an order refusing a common-law writ of mandamus is not reviewable in this court unless it appears in the order that it was not refused in the exercise of discretion. If it does not appear in the order that the writ was refused on a question of law only, this court must assume that it was denied in the proper exercise of the discretion of the Supreme Court, which cannot be reviewed here. (*People ex rel. Lentilhon v. Coler*, 168 N. Y. 6, and cases there cited.)

Section 5, article 3 of the Constitution provides that an apportionment shall be subject to review by the Supreme Court at the suit of any citizen, under such reasonable regulations as the legislature may prescribe, but the legislature never having acted under this provision and prescribed any procedure for a direct challenge of the validity of an apportionment the citizen is confined to existing remedies and, therefore, each of the proceedings before us has been an application for a common-law writ of mandamus. There is no express provision in the section of the Constitution quoted for review by the Court of Appeals of the action of the Supreme Court, and, therefore, the right to such review by this court proceeds from its general appellate jurisdiction. As already stated, its general appellate power does not authorize the review of an order denying an application for a writ of mandamus, unless it affirmatively appears on the face of the order that it was not made in the exercise of discretion. Even the great importance of this litigation would not justify the court in assuming a jurisdiction the possession of which it has so repeatedly repudiated.

It may be further said, as an additional reason why we should not strain to extend our jurisdiction, that a decision adverse to the validity of the apportionment act made now might throw the general election about to be held into inextricable confusion and chaos. The people have acted on the law and held their primary elections. Election districts have been laid out in all the great counties of this state under the new apportionment. It is difficult to exaggerate the confusion that might and probably would arise were the apportionment set aside at this time. If these cases are to come before us at all, it is far better that they should be heard and decided at a time when they can be considered solely with reference to the constitutional provision, uninfluenced by fear of results on a pending election. Even if the apportionment statute should subsequently be held void, the members of the legislature actually elected by the people under its provisions would be officers *de facto*, and the validity of their action

in no way impaired. (*People v. White*, 24 Wend. 520; *M'Instry v. Tanner*, 9 Johns. 135; *Parker v. Baker*, 8 Paige, 428.)

The appeals should be dismissed, without costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Appeals dismissed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
JAMES F. DOLAN, Respondent.

1. CRIMES — UTTERING OF FORGED NOTE — EVIDENCE OF THE UTTERING OF OTHER FORGED NOTES BY DEFENDANT — WHEN ADMISSIBLE. Where the only issue, upon the trial of a defendant charged with feloniously uttering a forged note with intent to defraud, is whether the defendant knew that the note was forged at the time that he indorsed it and had the amount thereof credited upon his bank account, evidence of the indorsement and uttering of other forged notes by the defendant is competent, especially where it appears that all of the notes were made at about the same time; that in each case the note was made payable to the defendant and indorsed by him; that during the period covered by all of the notes the defendant was in financial difficulties and endeavoring to raise funds to meet his obligations, and that in each case he used the name of some person or firm with whom he had done business and with whose affairs he was familiar, so that this combination of circumstances was sufficient to establish a common plan and identity of method so connected as to have a strong tendency to overcome any claim of innocent intent in the uttering of the note charged in the indictment.

2. SAME — WHEN CONTENTS OF FORGED PAPERS MAY BE PROVED BY SECONDARY EVIDENCE. While it is the general rule that, where it is sought to give evidence of other forgeries than the one charged in the indictment, the forged papers upon which such evidence is predicated must be produced, yet where such papers have not been produced by the defendant pursuant to notice served upon him by the prosecution, and there is evidence that the forged papers were returned to the defendant in the ordinary course of business, a question of fact is presented for the determination of the trial judge, and his decision thereon, permitting the prosecution to give secondary evidence of the contents of the forged papers, is not reviewable in the Court of Appeals.

3. SAME — SELF-SERVING DECLARATIONS AND HEARSAY STATEMENTS. While the defendant is entitled to introduce all proper evidence of facts tending to show that he did not know that the note was a forgery, and

N. Y. Rep.]

Statement of case.

of facts bearing upon the question of his intent in uttering the note, yet he is not entitled to testify to self-serving declarations and hearsay statements to the effect that his clerk had admitted to him and to the president of the bank at which the note was discounted, that she had made the note herself, especially where the clerk was present at the trial and might have been called as a witness.

4. SAME — ERRONEOUS TAKING OF EXHIBITS BY JURY — WHEN SUCH ERROR DOES NOT WARRANT REVERSAL OF JUDGMENT OF CONVICTION. Where exhibits introduced in evidence by the prosecution were taken into the jury room, by mistake or otherwise, without the consent of the defendant, but no objection was made to the jury having them until after a verdict had been rendered against the defendant, more than an hour thereafter, such fact does not constitute such a substantial error as to warrant the Court of Appeals in awarding a new trial, especially where the papers had been examined by the jury during the trial and it does not appear what, if any, use was made of them in the jury room.

People v. Dolan, 111 App. Div. 600, reversed.

(Argued June 11, 1906; decided October 2, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 9, 1906, which reversed a judgment of the Court of General Sessions of the Peace for the county of New York convicting the defendant of the crime of forgery in the second degree and granted a new trial.

The facts, so far as material, are stated in the opinion.

William Travers Jerome, District Attorney (*Robert C. Taylor* of counsel), for appellant. The trial court properly excluded the declarations that Miss Fitzpatrick made the note. (*Austin v. Bartlett*, 178 N. Y. 310; *Connolly v. R. R. Co.*, 179 N. Y. 7; *People v. Wolf*, 183 N. Y. 464, 477; *Kennedy v. People*, 39 N. Y. 245; *Reinhart v. People*, 82 N. Y. 608; *People v. Hawkins*, 109 N. Y. 408; *Greenfield v. People*, 85 N. Y. 75.) Evidence of similar crimes was competent. (*People v. Van Tassel*, 156 N. Y. 561; *People v. Everhardt*, 104 N. Y. 591; *People v. Place*, 157 N. Y. 584; *People v. Molineux*, 62 L. R. A. 193; *People v. Gaffey*, 182 N. Y. 257; *Hope v. People*, 83 N. Y. 418; *People v. Murphy*, 135 N. Y. 450; *People v. Zucker*, 20 App. Div.

363; 154 N. Y. 770; *Farrell v. People*, 21 Hun, 485; 84 N. Y. 656; *People v. Putnam*, 90 App. Div. 125.) The application for a new trial on the ground that the jury took certain exhibits into the jury room without defendant's consent was properly denied. (*People v. Buchanan*, 145 N. Y. 1; *People v. Draper*, 28 Hun, 1; *People v. Kelly*, 2 N. Y. Cr. Rep. 15; *People v. Johnson*, 110 N. Y. 134; *People v. Gallagher*, 75 App. Div. 39; 174 N. Y. 505; *People v. Flack*, 8 N. Y. Cr. Rep. 31; 57 Hun, 83; *People v. Johnson*, 110 N. Y. 134; *People v. Priori*, 164 N. Y. 459; *People v. Curnal*, 1 Park. Cr. Rep. 256.)

Alfred R. Page for respondent. The trial court erred in excluding evidence which tended to show that defendant did not know that the note was forged until after it became due, and what he did on making the discovery. (*Platner v. Platner*, 78 N. Y. 45; *Donohue v. People*, 56 N. Y. 208; *People v. Gardner*, 144 N. Y. 119.) Secondary evidence was received against the objection of the defendant as to the contents of notes other than the one specified in the indictment, which were claimed were forged and uttered by the defendant. (*Anson v. People*, 148 Ill. 503; Abb. Cr. Tr. Brief, 415; Underhill Cr. Ev. 488; *State v. Breckenridge*, 67 Iowa, 204; *Kearney v. Mayor, etc.*, 92 N. Y. 621; *People v. Corbin*, 56 N. Y. 363; *Regina v. Cook*, 8 C. & P. 582; *Fox v. People*, 95 Ill. 75; *Sherman v. People*, 13 Hun, 575.) Evidence was improperly admitted as to collateral notes in no way connected with the note described in the indictment. (*People v. Corbin*, 56 N. Y. 363; *People v. Weaver*, 177 N. Y. 434; *State v. Raymond*, 53 N. J. L. 265; *Coleman v. People*, 55 N. Y. 81.) The court erred in denying defendant's motion to set aside the verdict and for a new trial, upon the ground that the exhibits were improperly given to the jury. (*Howland v. Willetts*, 9 N. Y. 170; *Sanderson v. Bowen*, 2 Hun, 153; *Schappner v. S. A. R. R. Co.*, 55 Barb. 497; *Porter v. Mount*, 45 Barb. 422; *Dolan v. Aetna Ins. Co.*, 22 Hun, 403; *People v. Gallagher*, 75 App. Div. 43;

N. Y. Rep.] Opinion of the Court, per WERNER, J.

Matter of Foster, 34 Mich. 21; *Chance v. I., etc., R. R. Co.*, 32 Ind. 472; *W. B. & L. Co. v. Mix*, 51 N. Y. 560.)

WERNER, J. The defendant was indicted by the grand jury of New York county for the crime of forgery in the second degree. The indictment contained two counts. The first count charged him with forging a note dated October 13th, 1897, for two thousand dollars, payable to the order of himself at the West Side Bank, and purporting to be signed by the firm of Thos. Cockerill & Son. The second count charged him with feloniously uttering the same forged instrument with intent to defraud, knowing it to be forged. The first count was abandoned at the trial and the defendant was tried and convicted on May 19th, 1904, upon the second count.

There was ample evidence to warrant the jury in finding the defendant guilty of uttering the forged instrument as charged in the second count, but the judgment of conviction was set aside at the Appellate Division by a divided court, for errors said to have been committed by the trial court in its rulings upon the admission and exclusion of evidence.

That the note was a forgery was conceded; and it was established beyond a doubt that Cockerill & Son, whose name had been signed to it, had never authorized such signing. It was brought to the Twelfth Ward Bank of New York city on October 13th, 1897, the day of its date, by a Miss Fitzpatrick, who was the bookkeeper of the defendant. The evidence was sufficient to justify the jury in finding that the defendant called at the bank later in the same day and indorsed it. The amount of the note was then placed to his credit. The defendant, testifying in his own behalf, stated that he was not in New York city on that date; that he did not indorse the note until some days later, and that he did not then know it was a forgery, as he had many transactions of a somewhat similar character with the bank. The defendant was a stone contractor, and the evidence tended to show a course of business dealings between him and Cockerill & Son, who were building contractors.

For the purpose of showing guilty knowledge on the part of the defendant the prosecution proved the uttering by him of several other forged notes. The defendant's counsel objected to the evidence relating to these other notes, and the exceptions based upon that objection raise the important question in this case. Two of the other forged notes were signed with the name of Cockerill & Son and made payable to the defendant. They were indorsed by him and discounted at the Twelfth Ward Bank. The first one was a three months' note dated May 13th, 1897, and was for \$2,500. The second was a two months' note dated August 13th, 1897, and was for \$2,000. It was given to pay off the first note, and at the same time the defendant paid the bank \$500 and the amount of the discount. The note set up in the indictment was given to pay off this second note. There were two other forged notes signed with the name of James Stewart & Co., who were also building contractors, between whom and the defendant had been business dealings. Each one of these notes was for \$3,200, made payable to the defendant and indorsed by him. The first one was given to Isaac A. Hopper, who procured it to be discounted for the defendant at the Twenty-third Ward Bank and turned over the proceeds to the defendant. The second the defendant gave to John J. Hopper, a brother of Isaac, who loaned him money on it. Still another one of the forged notes was signed with the name of Patrick Gallagher, who was also a builder with whom the defendant had business dealings. This note was for \$1,697, and was discounted by the defendant at the Nineteenth Ward Bank. All these transactions took place in 1897, and the evidence shows that at that time the defendant was in financial difficulties.

We think that all this evidence was clearly competent and that the learned Appellate Division erred in holding otherwise. The rules governing the introduction of proof of other crimes than that charged in the indictment have been so fully discussed in recent cases in this court that no extended examination of the authorities need here be made. (*People v. Molineux*, 168 N. Y. 264; *People v. Weaver*, 177 id.

N. Y. Rep.] Opinion of the Court, per WERNER, J.

434.) The case at bar is controlled by the decision in *People v. Everhardt* (104 N. Y. 591). In that case the late Judge EARL stated the rule as follows: "Upon the trial the people were allowed to prove, against the objection of the defendant, the uttering of other forged checks by him upon other occasions. In this there was no error. The defendant by his plea of not guilty had put in issue everything which it was incumbent upon the people to prove. They had no direct or positive evidence that he personally forged the check which he uttered, and it was open for him to show that at the time he uttered it he had no knowledge that it was forged, and was therefore innocent of crime; and for the purposes of showing the prisoner's guilty knowledge in such cases it has always been held competent to prove other forgeries. Such proof is not received for the purpose of showing other crimes than that charged in the indictment, but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged, and it can be considered by the jury only for that purpose." "A man might think," said Judge PECKHAM in *People v. Sharp* (107 N. Y. 467), "the money he passed was good, and he might be mistaken once or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit." The latter observation very tersely states a rule that is as applicable to prosecutions for forgery as to cases of passing counterfeit money.

It is contended, however, that the rule has been changed by our decision in the recent case of *People v. Weaver* (177 N. Y. 434). We think there is no similarity between the two cases. In the *Weaver* case it was claimed by the defendant that she believed in good faith to have been authorized by one Davis to indorse the note there charged as a forgery. Evidence of other forged notes not bearing the name of Davis was admitted. This was held to be error. In the case at bar the defendant does not claim to have believed that he had authority to sign the name of Cockerill & Son to the forged note he is charged with uttering. His contention is that he

did not know it was a forgery. The difference between the two cases is obvious. Upon the record now before us the issue of guilty knowledge was squarely up and, as bearing upon it, evidence of the uttering of other forged instruments by the defendant was clearly competent.

There is also another ground upon which this evidence was competent. All the notes referred to in the evidence were made at about the same time. In each case they were made payable to the defendant and indorsed by him. During the period covered by all the notes the defendant was endeavoring to raise sufficient funds to meet his obligations, and in each case he used the name of some builder with whom he had done business and with whose affairs he was familiar. This combination of circumstances was sufficient to establish a common plan and identity of method so connected as to have a strong tendency to overcome any claim of innocent intent in the uttering of the note charged in the indictment. The evidence bearing on these other notes served to show that the defendant was endeavoring to meet his obligations as they became due, by making a fraudulent and intentional use of the names of contractors with whom he had business relations. The same general features were present in all of the transactions which seem to have been the product of one general scheme. These facts and circumstances were sufficient, we think, to bring the case within the exceptions to the general rule that excludes proof of extraneous crimes. As was said in the *Molineux Case* (168 N. Y. 264, 305): "They must be so connected as parts of a general scheme, or they must be so related to each other as to show a common motive or intent running through them." It is true that the evidence of this general plan or scheme also tended to show the defendant guilty of other crimes, but that, as was very aptly stated by Judge COOLEY in a Michigan case, is one of the misfortunes of such a defendant's position. (*Carver v. People*, 39 Mich. 786.)

It is further contended by the learned counsel for the defendant, that even if the evidence relating to the other

N. Y. Rep.] Opinion of the Court, per WERNER, J.

forged notes was admissible, yet no proper foundation was laid for its introduction. Notices to produce these other notes had been served by the prosecution upon the defendant, but they were not produced at the trial. The prosecution was thus driven to give secondary evidence of their contents. When that was attempted the objection was promptly raised that such evidence could only be received after proof of loss or destruction of the notes, or of their delivery to the defendant. It is an eminently safe rule that where it is sought to give evidence of other forgeries, the forged documents upon which it is predicated must be produced, and so it has been held in other jurisdictions. (*State v. Breckenridge*, 67 Iowa, 204; *State v. Saunders*, 68 id. 371; *People v. Lagrille*, 1 Wheeler's Crim. R. 412; *Anson v. People*, 148 Ill. 503.) But in none of the cases cited was there any notice to produce; neither were the instruments in question sought to be accounted for. The rule is subject to the same qualification in criminal as in civil cases. The instrument must be produced or its absence satisfactorily accounted for. (*State v. Cole*, 19 Wis. 129, 134.) Of course the mere notice to produce does not take the place of evidence, and it must be shown that the instrument is in the possession or under the control of the party required to produce it. (*Smith v. Sleap*, 1 Carr. & Kirw. 48.) "But of this fact very slight evidence will raise a sufficient presumption where the instrument exclusively belongs to him, and has recently been or regularly ought to be in his possession, according to the course of business." (1 Greenleaf Ev. § 560.) In *Robb v. Starkey* (2 Carr. & Kirw. 143; 61 Eng. Com. L. R. 143) a notice to produce a contract was served upon defendant. Plaintiff's clerk testified that he could not say positively whether he had sent that particular contract to Bourne, defendant's broker; but he also stated that if it came into his hands to be delivered to Bourne in the ordinary course of business, he had no doubt that it had been delivered. This was held sufficient to permit secondary evidence of the contract. To the same effect is *Henry v. Leigh* (3 Campb. 499), decided by Lord ELLENBOROUGH.

In the light of these suggestions let us now examine the evidence in the case at bar as to the other forgeries. There were five of them ; two Cockerill notes, two Stewart & Co. notes and one Gallagher note for \$1,697. There was fragmentary and incomplete evidence as to other Gallagher notes, but the evidence as to all Gallagher notes, except the one for \$1,697, was stricken out and need not be considered. In each case where the note then considered was not directly traced into the defendant's hands, an officer of a bank testified that it had been returned to the defendant, but this was stated not so much from personal recollection as from the regular course of business which had been followed. The first Cockerill note was for \$2,500, and was discounted at the Twelfth Ward Bank. It came due August 13th, 1897, and on that day was seen in the possession of the note teller. Later in the day the defendant came to the bank, paid \$500 and gave a new note for \$2,000, and also paid the amount of the discount, thus paying off the first note. The president of the bank who had conducted this transaction was dead, and there was nobody to swear that the note was actually delivered to the defendant. The second Cockerill note came due on October 13th, the date of the note set up in the indictment, and was paid off by the giving of the latter note. Defendant came to the bank on that day to indorse the latter note. Isaac A. Hopper, who was vice-president of the bank, testified that he returned one of these notes to the defendant, but he did not know which one, and the cashier testified to the custom that when a new note was given the old one was returned.

The first Stewart note was for \$3,200, dated July 29th or 30th, 1897, and payable at the Marine Bank of Buffalo. It was discounted at the Twenty-third Ward Bank of New York city at the request of Isaac A. Hopper, and fell due about October 25th, 1897. On October 19th John J. Hopper, a brother of Isaac, loaned defendant \$3,200 to pay off this note, and defendant promised to bring the note to him when paid, but failed to do so. It was paid by defendant at the bank on October 29th, and ordered returned from Buffalo, to

N. Y. Rep.] Opinion of the Court, per WERNER, J.

which place it had been mailed. It was received at the bank on October 26th. The second Stewart note was returned to defendant by John J. Hopper. The Gallagher note was discounted at the Nineteenth Ward Bank and came due about August 25th, 1897. Defendant paid the note at the bank on August 27th. He had received a \$1,500 check from John J. Hopper and this check was received at the bank when the note was paid.

From this *resume* of the evidence bearing upon the ultimate disposition of the several notes referred to, we think it is quite permissible to draw the conclusion that they were all returned to the possession of the defendant. That was the ordinary course of business, as testified to by one of the witnesses, and that is the familiar experience of all who have occasion to pay notes at banks. There was evidence in this behalf which, to say the least, presented a question of fact for the determination of the trial judge, and his decision thereon is not reviewable in this court. (*Dix v. Atkins*, 128 Mass. 43; *Kearney v. Mayor, etc., of N. Y.*, 92 N. Y. 617, 621; *Mason v. Libbey*, 90 id. 683; *McCulloch v. Hoffman*, 73 id. 615; Thompson on Trials, § 806.) It may be added that where the instruments sought to be produced are of little or no value, as in this case, the proof required to establish loss or possession is proportioned to their character and value. (*Jackson v. Root*, 18 Johns. 60, 73; Thompson on Trials, § 809; 1 Greenleaf Ev. § 558.)

The next question for consideration arises upon the exclusion of certain questions put to the defendant by his counsel when he was testifying in his own behalf. The defendant had testified that he did not know that the note set up in the indictment was a forgery until it became due on November 13th, 1897, when he was informed by Mr. Steers, the president of the bank, that there was an informality about it, and that he, the defendant, returned to his office and had a conversation with Miss Fitzpatrick. The following questions were then asked him and excluded under exception: "Q. As a result of that conversation did you direct her to go to any

one and tell her what to tell them? Q. Who did you tell her to go to see? Q. Did you afterwards, after that time, see Mr. Steers, the president of the bank, and did he tell you that Miss Fitzpatrick had been to see him? Q. Did you after that time see Mr. John F. Cockerill, and did he tell you that Miss Fitzpatrick had been to see him? A. Yes, sir; he did. Q. Now, when you saw Miss Fitzpatrick at your office did she tell you that she had made that note? Q. Did Mr. Steers, the president of the bank, after the 13th day of November, 1897, tell you that she had been to see him and told him that she made that note? Q. Did Kate Fitzpatrick, when you saw her in the office, tell you that she had made that note?" It is contended by the learned counsel for the defendant, and the Appellate Division has held, that the facts called for by these questions were admissible as tending to show that the defendant did not know the note set forth in the indictment was a forgery, and as bearing upon the question of his intent in uttering it. It may be conceded that he had the right to introduce all proper evidence tending to establish these facts, but we do not think the evidence called for by the quoted questions is of that character. It is obvious that these interrogatories were designed to elicit self-serving declarations and hearsay statements of the bank president and Miss Fitzpatrick, the latter of whom was in the court room and might have been called had the defendant desired her evidence. It appears that the bank president had died prior to the trial, but that did not make the evidence admissible. (*Gray v. Goodrich*, 7 Johns. 95.) Had the declarations called for been admitted they would have been hearsay, which were not within any of the exceptions to the rule excluding such evidence. We think the rulings of the trial court in this regard were correct, since the defendant was permitted to testify to the one competent fact, that the first knowledge he had that the note was a forgery was when he talked with Miss Fitzpatrick.

After the jury had brought in their verdict the counsel for the defendant called attention to the fact that the jury had

N. Y. Rep.] Opinion of the Court, per WERNER, J.

taken to the jury room certain exhibits introduced in evidence by the prosecution. This was subsequently urged as ground for setting the verdict aside. It does not clearly appear just how the jury obtained possession of the exhibits. Under section 425 of the Code of Criminal Procedure, exhibits can be taken into the jury room "only upon the consent of the defendant and the counsel for the people." The defendant did not consent to the taking of these exhibits, but no objection was made to the jury having them until after the verdict against the prisoner had been rendered, which was more than an hour after the jury had retired for deliberation. The exhibits thus taken were two notes made by the defendant on the same date as the note charged in the indictment, introduced to show that the defendant was in New York city on that date, and a specimen note written by the defendant at the trial at the request of the district attorney. These papers had been examined by the jury during the trial. It does not appear what use the jury made of them while in the jury room, and we do not think their further examination of them, if any, was such a substantial error as to warrant this court in awarding a new trial. It is our duty to render judgment without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties. (Code Crim. Pro. § 542; *People v. Gallagher*, 75 App. Div. 39; *affd.*, 174 N. Y. 505.)

The record contains other exceptions to rulings and to refusals by the trial court to charge as requested by defendant's counsel, but these present no question of sufficient importance to justify further discussion.

The order of the Appellate Division should be reversed, and the judgment of conviction of the trial court affirmed.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WIL-
LARD BARTLETT and CHASE, JJ., concur.

Order reversed, etc.

WILLIAM KELLY, Respondent, v. SECURITY MUTUAL LIFE
INSURANCE COMPANY, Appellant.

1. INSURANCE — PREMATURE ACTION TO RECOVER DAMAGES FOR THE REPUDIATION BY A MUTUAL LIFE INSURANCE COMPANY OF ITS OBLIGATION UNDER A POLICY. The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages is usually applied only to contracts of a special character, even in jurisdictions where it obtains at all; it is not generally applied to contracts for the payment of money at a future time, and has not been extended in this state to such contracts made by mutual life insurance companies.

2. REMEDY OF POLICYHOLDER IS AN EQUITABLE ACTION TO PRESERVE CONTRACT OF INSURANCE. Where in an action upon a policy issued by a mutual life insurance company to recover damages for an alleged breach of its contract to pay a sum of money on the death of the plaintiff, the only allegation in the complaint as to a breach was that the defendant wrongfully declared the contract "void and forfeited, denied that the plaintiff had any right thereunder," and refused "to continue said policy in force," a judgment for damages cannot be sustained, since the time not having arrived for performance the policy is still in force and an action at law will not lie; the plaintiff's remedy, if any, is in equity to compel recognition by the defendant of its obligations under the policy.

Kelly v. Security Mutual Life Ins. Co., 106 App. Div. 352, reversed.

(Argued June 14, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 10, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The complaint contains two counts, in the first of which the plaintiff alleged, in substance, that in August, 1889, the defendant, a domestic corporation duly authorized, issued to him its policy of insurance for \$1,000, payable on his death to his wife, the policy being referred to as part of the complaint; that the plaintiff performed his part of the contract, but the defendant wrongfully declared said policy forfeited and refused to continue it in force; that the beneficiary transferred her

N. Y. Rep.]

Statement of case.

rights thereunder to him and that the policy was worth to him \$1,000, in which amount he alleged he had sustained damages.

The second count was upon a like policy payable to the children of the plaintiff, who transferred their rights to him before the commencement of the action. Judgment was demanded for the sum of \$2,000, with costs.

Each policy was a certificate of the defendant admitting the plaintiff to membership, subject to certain specified conditions, including the prompt payment of quarterly dues on the days named. Upon his death his wife in one case and his children in the other, became entitled to payment from the reserve fund of the sum of \$1,000. The failure to pay dues rendered the contract void and forfeited all payments made thereon, with an unimportant exception. The answer alleged as an affirmative defense that the policies became null and void on the 2nd of May, 1903, because the defendant failed to pay the premiums which fell due on that day as required by the contracts.

The question sent to the jury was whether the defendant by its course of dealing with the plaintiff had waived strict performance as to the payment of dues on the law day. They were instructed if they found a waiver to bring in a verdict in favor of the plaintiff for the present value of the policies, including interest. The jury found a general verdict for the plaintiff for \$1,289.78. The judgment entered thereon was unanimously affirmed by the Appellate Division and the defendant appealed to this court.

Celora E. Martin and *F. W. Jenkins* for appellant. The complaint did not state a cause of action, and there was no proof to justify the judgment from which this appeal is taken. (*Hencken v. U. S. L. Ins. Co.*, 11 Daly, 282; 98 N. Y. 627; *St. John v. A. M. L. Ins. Co.*, 13 N. Y. 31; *Walsh v. M. L. Ins. Co.*, 133 N. Y. 408; *Olmstead v. Keyes*, 85 N. Y. 593; *Atty.-Gen. v. Ins. Co.*, 82 N. Y. 172; *People v. Ins. Co.*, 103 N. Y. 480; *Ins. Co. v. Stratham*, 93 U. S. 24; *Frank v. Ins. Co.*, 102 N. Y. 266; *Fowler v. Ins. Co.*,

116 N. Y. 389; *Attorney-General v. C. L. Ins. Co.*, 93 N. Y. 70; *Holly v. M. L. Ins. Co.*, 105 N. Y. 437; *Langan v. Supreme Council*, 174 N. Y. 266; 176 N. Y. 595.)

S. Mack Smith for respondent. An action at law is the proper remedy for the general breach of a contract of life insurance. (*I. & G. T. Co. v. Tod*, 180 N. Y. 230; *Steinbock v. Diepenbrock*, 158 N. Y. 30; *Meyer v. K. L. Ins. Co.* 73 N. Y. 516; *Fisher v. H. M. L. Ins. Co.*, 69 N. Y. 161; *Day v. C. L. Ins. Co.*, 45 Conn. 480; *Shaw v. R. L. Ins. Co.*, 69 N. Y. 286; *Speer v. P. M. L. Ins. Co.*, 36 Hun, 322; *Evans v. S. T. M. R. Assn.*, 182 N. Y. 453; *Whitehead v. N. Y. L. Ins. Co.*, 102 N. Y. 143.)

VANN, J. Before any evidence was taken at the trial the defendant moved to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, but the motion was denied and the defendant excepted. This ruling survives unanimous affirmance by the Appellate Division and is open to review by this court. (*Jones v. Reilly*, 174 N. Y. 104; *Sanders v. Saxton*, 182 N. Y. 477, 478.)

The defendant was not required to present the question by demurer or answer, but could raise it by motion made at the trial. (*Weeks v. O'Brien*, 141 N. Y. 199, 203; Code Civ. Pro. § 499.)

The case made by the complaint was not in equity to relieve from forfeiture and reinstate the policy, but purely at law to recover damages for the breach of its contract by the defendant. The only promise made by the defendant in the contract was to pay a sum of money on the death of the plaintiff, but no breach of that promise was alleged. The plaintiff is still living and nothing is yet due upon the contract, according to its terms. What breach was alleged? The only allegation on that subject is that the defendant wrongfully declared the contract "void and forfeited," denied that the plaintiff had "any rights thereunder," and refused "to con-

N. Y. Rep.]

Opinion of the Court, per VANN, J.

tinue said policy in force." How or why, when, to whom or by whom the defendant declared the contract forfeited, or denied the plaintiff's rights thereunder, or refused to continue it in force, is not stated. There is no allegation of a refusal to receive premiums, or give receipts therefor, or that the defendant had never recognized its contract, or that it had not retracted its repudiation, or that it was in such a position that it could not retract. The pleader was satisfied with the conclusion that he set forth. This was not a breach of the contract, because the time for performance by the defendant had not arrived. An attempt to repudiate such a contract does not make it due. If the maker of a promissory note, given for borrowed money and due one year after date, notifies the holder the next day that he repudiates it and will not pay it, can the holder sue at once? Can a mortgagor make his mortgage due before the law day by repudiating it in advance?

The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages, is usually applied only to contracts of a special character, even in the jurisdictions where it obtains at all. It is not generally applied to contracts for the payment of money at a future time and in some states the principle is not recognized in any way whatever. (*Daniels v. Newton*, 114 Mass. 530; *Stanford v. McGill*, 6 N. Dak. 536; *Carstens v. McDonald*, 38 Neb. 858; *King v. Waterman*, 55 Neb. 324.) In other states and in the Federal courts the principle is adopted but applied with caution. (*Roehm v. Horst*, 178 U.S. 1, 17, 18; *Schmitt v. Schnell*, 14 Ohio C. C. 153; *Brown v. Odill*, 104 Tenn. 250; *Roebbing's Sons Co. v. Fence Co.*, 130 Ill. 660; *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536.) In this state it seems to be limited to contracts to marry (*Burtis v. Thompson*, 42 N. Y. 246); for personal services (*Howard v. Daly*, 61 N. Y. 362) and for the manufacture or sale of goods (*Windmuller v. Pope*, 107 N. Y. 674; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471); at least we have not extended it to mutual life insurance policies, perhaps for the

reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policyholders.

The plaintiff alleges a breach only by anticipation. We held directly against his contention in a recent case which we regard as controlling. (*Langan v. Supreme Council Am. L. of H.*, 174 N. Y. 266.) That was an action at law founded upon a certificate of insurance, whereby the defendant promised, upon the death of the plaintiff, to pay his wife a sum not exceeding \$5,000. The plaintiff alleged performance until the "defendant by its wrongful act broke the said contract and declared the same void." He further alleged that the defendant had "failed to carry out the conditions of the contract by declaring that it will not perform the contract or pay the insurance agreed to be paid, and that, upon his death, the beneficiary will not then be entitled" to the sum specified, "and that by reason of the breach of the aforesaid contract by defendant, plaintiff has sustained damages in the sum of \$5,000." A judgment for \$1,505.96, "the present value of the policy," was affirmed by the Appellate Division, but reversed by this court, upon the ground that "there was no breach of contract * * * which justified an action for damages; that the action of the plaintiff" in tendering performance "preserved the contract of insurance as it was; that he was not, thereupon, compelled to a course of inaction, but might resort to a court of equity * * * and compel the defendant to live up to its contract."

The principle of that case controls this. Both actions were at law to recover damages for the breach of the same kind of a contract and in the same way. As we held that an action at law would not lie in that case because there was no breach, and that the remedy of the plaintiff was in equity, we are compelled to hold the same way in this case. The plaintiff had no right to sue for damages before the time for performance by the defendant had arrived. He had sustained no damages, for the policy was still in force, and if it refused to

N. Y. Rep.] Dissenting opinion, per EDWARD T. BARTLETT, J.

recognize its obligation thereunder he could compel recognition by a judgment exactly adapted to the situation.

The judgment below should be reversed and a new trial granted, with costs to abide event.

EDWARD T. BARTLETT, J. (dissenting). A motion was made, at the opening of the trial, to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, which was denied and exception taken.

The defendant's contention is that the plaintiff alleges no present breach of the contract of insurance; that if he had any remedy it was an action in equity to compel performance and not at law for damages; that the decision of this court in *Langan v. Supreme Council Am. L. of H.* (174 N. Y. 266) is a controlling authority against the form of action adopted by the plaintiff.

The plaintiff in the third paragraph of his first cause of action alleges due and complete performance of the contract on his part, and pleads as follows in the fourth paragraph of the same cause of action: "Plaintiff further alleges that notwithstanding the faithful performance of the contract upon his part, this defendant wrongfully, unlawfully and illegally and in violation of said contract and the rights of this plaintiff, by and through its officers and agents, have declared the said policy of insurance lapsed and forfeited, together with all payments thereon and dividends declared and earned, and deny that plaintiff has any rights thereunder, and refuse to continue said policy in force."

It seems very clear that, assuming an action at law was proper, there is enough in this complaint to permit plaintiff to prove, as is pleaded, performance of the contract on his part; also to establish by competent testimony the actions and declarations of the officers of the defendant, constituting what is claimed to be a complete breach of the contract of insurance on the part of the defendant. One breach of the contract alleged is the refusal to accept tender of all sums due under the same.

The defendant insists, as a separate point, that our decision in *Langan v. Supreme Council Am. L. of H.* (174 N. Y. 266) is directly against the plaintiff's contention. The case at bar and the case cited are, in my opinion, clearly distinguishable. While I joined in the dissent in the case cited, I now give loyal support to the principle established by that decision. On the other hand, I insist the doctrine of that case ought not to be extended; the rule should be stringently applied that only the questions raised were decided, and the broader statements of the opinion must be disregarded.

The facts in the *Langan Case* (*supra*) are, briefly, as follows: Langan, in August, 1882, insured his life with the defendant for \$5,000.00, receiving its regular certificate, which stated, among other things, that it was issued subject to statements in the application of the insured, which was made a part of the certificate. In this application the insured agreed to "conform in all respects to the laws, rules and usages of the Order now in force, or which may hereafter be adopted by the same." The contract was duly performed by the insured until the year 1900, when the defendant amended its by-laws so as to read as follows: "Two thousand dollars shall be the highest amount paid by the Order on the death of a member upon any benefit certificate *heretofore* or hereafter issued."

The plaintiff insisted that this amendment was without force or effect on certificates issued prior to its date, and the defendant company claimed that the plaintiff in his application had expressly conferred upon it the power to enact such amendment. The defendant having refused to receive premiums and deal with plaintiff generally on the basis of a five-thousand-dollar certificate, the latter brought his action at law for damages as for a breach of the contract.

The case presented an honest difference of opinion as to the scope and effect of the contract of insurance, which raised only a question of construction of the written instruments, and it was held that plaintiff had mistaken his remedy and was not entitled to bring his action at law for damages, but should have asked a court of equity to construe the contract

N. Y. Rep.] Dissenting opinion, per EDWARD T. BARTLETT, J.

and decree its enforcement. It was not a question of breach, each party standing on the contract, but an appeal to the court to construe the clause in the original application concerning which the parties could not agree. This is the sole question decided, or that can be decided, when the *Langan* case is properly in a court of equity.

In the case at bar neither party attacks the contract; the plaintiff avers full performance on his part; the defendant alleges that by reason of the failure of plaintiff to pay certain premiums on the day when due, May 2nd, 1903, the policies lapsed. The plaintiff undoubtedly could have resorted to a court of equity and asked that the contract be performed, but he preferred to take the defendant at its word, treat it as in breach of the contract, and sue at law for damages. The *Langan* case did not and could not decide the question here presented, and I am not aware of any case in this court that has decided it.

In considering the question of election of remedies it is proper to recall what facts were settled by the unanimous decision affirming the judgment of the Trial Term in plaintiff's favor. It is undisputed that the plaintiff paid his premiums in full in cash a long term of years prior to the 2nd day of May, 1903. It is also undisputed that during said period when premiums were so paid, the defendant had, on not less than fifty occasions, received from the plaintiff his premiums when same had not been promptly paid on the day when due under the terms of the policies.

On the 5th day of May, 1903, the plaintiff called at the office of the defendant and offered to pay the premiums due on said policies three days before, and was informed, in substance, that the policies were forfeited and could not be renewed as he was too old and that the company could not carry his risk any longer. It having become apparent to the plaintiff after some subsequent negotiations that the defendant stood upon the absolute forfeiture of the policies, he brought his action at law for damages. The refusal of defendant to receive these premiums as tendered was a clear breach

Dissenting opinion, per EDWARD T. BARTLETT, J. [Vol. 186.

of the contract. The defendant by accepting on fifty or more occasions the payment of premiums after the day when due, agreed to a modification of the contract provided payment was not unreasonably deferred. (*De Frece v. National Life Ins. Co.*, 136 N. Y. 144, 150, 151, and cases cited at page 151; same principle recognized in *Kenyon v. K. T. & M. M. A. Assn.*, 122 N. Y. 247.)

The plaintiff having received assignments from all the beneficiaries is vested with any right of action against the defendant arising under the contract of insurance. I see no difference between the contract of insurance and any other contract which is to be performed years after its execution as to the remedy in case of breach. It is for the plaintiff to determine whether he will struggle on with hostile, and possibly insolvent parties, by asking a court of equity to enforce the contract, or whether he will free himself by proving his damages in a court of law.

That this view of the law has been entertained by learned judges is illustrated in *Speer v. Phoenix Mutual Life Ins. Co.* (36 Hun, 322), an action decided in the General Term of the first department, Presiding Justice NOAH DAVIS writing the opinion, which was concurred in by Mr. Justice DANIELS. The action was brought to recover damages for an alleged breach of contract by defendant in refusing to receive the annual premium on a policy of life insurance and continue the insurance. The defendant sought to justify this refusal on the ground that the policy was obtained by fraudulent representations as to material facts. While the judgment in this case was reversed by the General Term, on the ground that an improper rule had been adopted as to the measure of damages, the learned judge writing the opinion said: "The defendant by refusing to receive the premium and continue the policy broke the contract at the date of such refusal, and subjected itself to the consequences that follow the breach of a binding agreement. The plaintiff had two remedies — one, to enforce the policy in equity by compelling the company to receive the premium and continue the insurance in force;

N. Y. Rep.] Dissenting opinion, per EDWARD T. BARTLETT, J.

the other to recover at law such damages as he sustained by reason of the breach." There are other cases in the lower courts holding this same doctrine.

To say that the plaintiff is still living and that there is nothing due to the beneficiaries on this contract according to its terms may be said of many contracts which are to be performed in the future, whether it be for the breach of a contract to marry, the delivery of personal property, the performance of labor, or the carrying out of covenants entered into in the varying phases of business life and which have, upon breach, been held a proper foundation for an immediate action at law for damages.

The contracting parties in an insurance contract are the insured and the insurance company; the insured can at pleasure permit the policy to lapse by reason of non-payment of premiums if rights of creditors are not involved; he may change his beneficiary at any time by complying with certain provisions of the contract, or the statute. In other words, he possesses all the rights of a party to a contract. In the case at bar the record shows a change of beneficiaries under the statute (Laws of 1883, ch. 175, § 18), which permits the insured to change his beneficiary without acquiring the consent of the latter. This is a statute regulating co-operative and assessment life and casualty insurance associations.

The certificate, or policy, in the case at bar contains various covenants to be performed by the defendant company other than payment on the death of the insured. Prominent among them is a covenant providing for the equitable division of the reserve fund, with all accumulations from lapses and interest and a bond issued therefor to each member for his share at the end of each five years. The plaintiff is a holder of two of these bonds issued at end of first five-year period; none was issued at end of second five-year period. These bonds, under certain limitations, could be applied in payment of amount due from members for mortuary premiums.

The unanimous affirmance establishes beyond dispute that these policies were not a simple contract for payment of

Dissenting opinion, per EDWARD T. BARTLETT, J. [Vol. 186.

money on death of insured, but involved valuable provisions benefiting the insured in his lifetime.

In my opinion the undisputed facts warranted the plaintiff in taking defendant at its word and treating it as in breach of its contract and liable to respond in damages in an action at law, under the great weight of authority in England and the United States. Many of the cases are reviewed by the Supreme Court of the United States in *Roehm v. Horst* (178 U. S. 1). The court there held in the matter of four outstanding executory contracts for the sale of hops, that a positive refusal to perform them constituted such a breach that damages could be recovered in an immediate action. The court pointed out that it had become the settled law of England that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it as applied to contracts for services, for marriage, and for the manufacture and sale of goods (p. 8).

Hochster v. De La Tour (2 El. & B. 678) treats of contract for services; *Frost v. Knight* (L. R. [7 Ex.] 111) defendant had promised to marry plaintiff so soon as his (defendant's) father should die; defendant announced his refusal to perform and it was held an action would lie for breach in father's lifetime; *Brown v. Odell* (104 Tenn. 250). Numerous other cases are cited in 174 U. S. 1 (*supra*). In this state there are cases dealing with varying facts. *Burtis v. Thompson* (42 N. Y. 246) holds that in a breach of promise of marriage action may be brought at once, although time of performance had not arrived; *Howard v. Daly* (61 N. Y. 362) holds that a contract for future employment, repudiated by employer, authorizes action to be brought at once for the breach; *Windmuller v. Pope* (107 N. Y. 674), purchaser of goods prior to time for delivery notified seller that he would not receive them; vendor held entitled to sue at once; *Speer v. Phoenix Mutual Life Ins. Co.* (36 Hun, 322), already cited and quoted from, applies the doctrine under discussion to the contract of insurance repudiated by the company. In *Cutter v. Powell* (2

N. Y. Rep.] Dissenting opinion, per EDWARD T. BARTLETT, J.

Smith's Leading Cases, at p. 1 *et seq.*) will be found a learned and exhaustive note upon this general subject.

The principle to be extracted from the cases is that if one party to a contract informs the other party that he repudiates it, regards it as terminated, the other party has two courses open to him; he can take the notifying party at his word and sue at once for damages, or he can go into equity and compel performance. There is certainly no hardship in applying this rule to the case before us.

If, as I insist, the *Langan Case* (*supra*) offers no obstacle, what is there in the position of this defendant that calls for the protection of the court. It has refused to accept premiums when due; it has declared to the plaintiff that his policies had lapsed and forfeited; that he had no interest therein; that he was too old and it would not carry his risk longer.

I see no legal objection to this court including co-operative and assessment insurance associations in the list of cases where the doctrine that there may be an anticipatory breach of an executory contract, by an absolute refusal to perform it, which will warrant an immediate action at law for damages.

Experience and the records of this court establish that it is not the modern creation, generally described as the co-operative mutual benefit and assessment association, which most needs judicial protection, but rather the indigent, ignorant and unprotected policyholder, who, in many instances, after paying premiums for eighteen or twenty years, finds himself in his old age entangled in the provisions of artfully or ignorantly-drawn contracts and confronted with the possible loss of insurance he has maintained for those dependent upon him by a life of toil and self-denial.

The courts below made a proper disposition of this case, and the judgment should be affirmed, with costs.

CULLEN, Ch. J., GRAY, WERNER and WILLARD BARTLETT, JJ., concur with VANN, J.; EDWARD T. BARTLETT, J., reads dissenting opinion; CHASE, J., not sitting.

Judgment reversed, etc.

JOHN M. BOWERS, as Receiver of the MERCANTILE CREDIT GUARANTEE COMPANY OF NEW YORK, Respondent, v. WILLIAM M. MALE et al., Appellants, Impleaded with Others.

1. CORPORATIONS — PERSONAL LIABILITY OF DIRECTORS FOR WASTED FUNDS. Directors of a corporation who fail to administer its affairs honestly and with reasonable prudence, not through excusable neglect, but by actual misfeasance in appropriating corporate funds to their own use, are personally liable to a receiver of the corporation for the damages which their misconduct has occasioned to the corporation.

2. SAME. The facts examined in an action by the receiver of an insolvent credit insurance company against its directors personally to recover sums alleged to have been wasted by the defendants in the purchase of the worthless stock of another corporation under the control of said company, and held to establish the personal liability of the defendants.

Bowers v. Male, 111 App. Div. 209, affirmed.

(Argued June 14, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 5, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought by the receiver of the Mercantile Credit Guarantee Company of New York to recover from directors of that company the sum of \$30,000 of the corporate funds alleged to have been misapplied and wasted in the purchase of 300 shares of the worthless stock of a corporation known as the Reserve Company. Further facts appear in the opinion.

William J. Curtis, Charles A. Collin and Francis D. Pollak for appellants. The purchase of the Reserve Company stock by the directors on December 30, 1895, and its repurchase by the company on March 3, 1896, were in truth and fact two phases of one transaction, and two steps in the execution of a single plan. The transaction involved no waste. Neither profit to the directors nor loss to the company was intended or resulted. The transaction's sole purpose

N. Y. Rep.] Opinion of the Court, per WERNER, J.

and only result was to enable the company to continue business by making satisfactory reports to the west, and having resulted in no damage to the Mercantile Company and no profit to any director, the company could maintain no action for waste on account of it. (*Kavanaugh v. Com. Trust Co.*, 181 N. Y. 121; *Matter of Johnson*, 57 App. Div. 494; *Ter Kinto v. Marsland*, 81 Hun, 420; *Wiles v. Suydam*, 64 N. Y. 173; *N. Y. & N. H. Ry. Co. v. Schwyler*, 17 N. Y. 592; *Mabon v. Miller*, 81 App. Div. 10.)

George Zabriskie for respondent. The purchase of the Reserve Company's shares was a misapplication and waste of the funds of the credit company, was a wrong and injury to the company and was a violation of the defendants' duties as directors, for which the receiver is entitled to recover damages. (L. 1858, ch. 314; *Atty-Gen. v. G. L. Ins. Co.*, 77 N. Y. 272; *Hun v. Cary*, 82 N. Y. 65; *P. C. Co. v. Macmillan*, 119 N. Y. 46; *O'Brien v. Fitzgerald*, 143 N. Y. 377; *Mason v. Henry*, 152 N. Y. 529; *Dykman v. Keeney*, 154 N. Y. 483; *Hinds v. F. & M. G. Co.*, 96 App. Div. 14.) The defenses suggested by the defendants are insufficient to relieve them from liability. (Pomeroy on Remedies, § 769; *Blanchard v. Trim*, 38 N. Y. 225; *Shull v. Ostrander*, 63 Barb. 130; *Knowles v. Toone*, 96 N. Y. 534; *Dechert v. M. L. Co.*, 9 App. Div. 573; *Matter of Miller*, 77 App. Div. 473; *F. L. & T. Co. v. S. D. S. C. Co.*, 45 Fed. Rep. 518; *Trudo v. Anderson*, 10 Mich. 357; *Hotchin v. Kent*, 8 Mich. 526; *Bank of New York v. A. D. & T. Co.*, 143 N. Y. 559; *Rankin v. Bush*, 93 App. Div. 181.)

WERNER, J. The referee's opinion, upon which the judgment herein was affirmed at the Appellate Division, so fully sets forth the facts of the case and so clearly demonstrates the legal liability of the defendants that we should also feel disposed to affirm without discussion were it not for one feature of the able and ingenious argument of counsel for the appellants that should not pass unchallenged.

Connsel contend that the courts below have erred in ascribing illegality to the whole of a concrete transaction by selecting for condemnation a single one of the parts which, although concededly repugnant to good morals and sound legal principles, when considered by itself, is said to be purged of all vicious characteristics and invested with the attributes of legal honesty when associated with other phases of the same transaction. The statement of a few facts will suffice to disclose the precise point of appellants' contention and our answer to it.

In 1894 the defendants were directors of the Mercantile Credit Guarantee Company, which was engaged in the business of "gnaranteeing or insuring merchants against excessive or unlooked for losses." The operations of the corporation, which was organized under the laws of this state, extended into other states. Among these was the state of Ohio, under the laws of which this corporation was classed as an insurance company whose reserve or surplus must equal fifty per cent of the premiums on insurance in force at the end of each year. The financial condition of the company rendered it impossible to comply with this requirement of the laws of Ohio. The stress of this emergency developed a plan for the temporary creation of a fictitious surplus. The scheme, stated in bare outline, was to increase the company's surplus to the extent of \$50,000 by the retirement and cancellation of an equal amount of its capital stock, and to the extent of another \$50,000 which was to be raised in cash. These things were to be accomplished through the medium of a corporation known as the "Reserve Company," which was to be capitalized at \$100,000 and officered by men who held positions in the Mercantile Company. In exchange for the \$50,000 of the canceled capital stock of that company, which, of course, had to be surrendered by its stockholders, the latter were to receive \$50,000 of the capital stock of the Reserve Company. In order to give that capital stock at least the semblance of some value it was necessary that it should pay a dividend, and this was to be effected by means of a contract between the

N. Y. Rep.] Opinion of the Court, per WERNER, J.

Mercantile Company and one Smith, which was assigned by the latter to the Reserve Company. Under this contract the Reserve Company, as the assignee of Smith, was to secure (1) the exchange of \$50,000 of Mercantile stock for an equal amount of Reserve stock; (2) the delivery for cancellation of the \$50,000 of Mercantile stock thus exchanged; (3) the payment by the Reserve Company to the Mercantile Company of \$50,000 in cash in three installments at stated periods. In consideration of the performance of these conditions of the contract, the Mercantile Company agreed to pay to the Reserve Company one dollar for every \$1,000 of insurance in force on its books on the following first of January and of each January thereafter during the life of the contract. This was the fund from which the Reserve Company was to pay its dividends. It cannot escape notice that this general scheme, which was quite elaborate in detail, could not have been successful without the apparent acquiescence of the stockholders of the Mercantile Company, which was expressed in an omnibus ratification appended to the transaction and supplemented by a stockholders' resolution authorizing the board of directors to purchase Reserve Company stock at its par value or less, and to deduct the amount of the moneys so used from the surplus or reserve of the Mercantile Company over and above its capital. This resolution expressly provided, however, that no part of the Reserve stock so purchased should appear as an asset of the Mercantile Company upon its books.

Without dwelling upon the details by means of which the general plan was to be worked out, it is sufficient to say that prior to July, 1895, only a single share of the Reserve Company's stock had been sold outside of that exchanged for the stock of the Mercantile Company, and the latter still needed \$30,000 more of surplus to be able to comply with the insurance laws of Ohio, although the time for making its report had already passed and been extended. There had been no payments upon any of the installments of \$50,000 which the Mercantile Company was to receive under the con-

tract made with Smith and assigned by him to the Reserve Company. In this situation the appellants, who were then officers and directors of the Mercantile Company, subscribed for 300 shares of the Reserve Company's stock and paid for it the sum of \$30,000 with money borrowed from the Phoenix National Bank. On the same day the Mercantile Company deposited the \$30,000 thus raised in the same bank and received a certificate of deposit "payable on the return of this certificate to the order of the officers of said company duly approved by three of the following: W. H. Male, Siegmund J. Rach, Leopold Herzig, William M. Deen and C. Vincent Smith;" the five persons named being the defendants herein. Thus the Mercantile Company was at last enabled to file a satisfactory report with the insurance authorities of Ohio. The filing of this report was followed in rapid sequence by the adoption of several resolutions by the directorate of the Mercantile Company authorizing the purchase of \$30,000 of the Reserve Company's stock, and under these resolutions the defendants, as officers of the Mercantile Company and on its behalf, bought of the defendants, as individuals, the Reserve Company's stock held and owned by them, payment therefor being made by the Mercantile Company's checks, on the Phoenix National Bank. The net result of this transaction was to place in the treasury of the Mercantile Company capital stock of the Reserve Company of the nominal value of \$30,000, but actually worthless, and which, under the stockholders' resolution of December, 1894, was not to appear as an asset of the company.

This was the condition of affairs in December, 1895, when the Mercantile Company was confronted with the necessity of filing another report as to assets and surplus in a western state, and to meet this second emergency the transaction above outlined was substantially repeated. The only difference was that now the \$30,000 of the Reserve Company's stock was to be purchased by the defendants from the Mercantile Company, which was the apparent owner thereof, but beyond that, the two transactions were identical. In the

latter instance as in the former, the \$30,000 of cash which had been used to swell the assets of the Mercantile Company for the purpose of deceiving the insurance authorities and the public, was withdrawn from the corporate treasury by the same individuals, who as trustees of the corporation had placed it there.

The validity of the judgment based upon these facts is assailed by the appellants because, as stated in the argument of their counsel, the allegations of the complaint and the legal conclusions of the learned referee proceed upon the theory that the defendants are chargeable with the single act of selling to the corporation of which they were directors, 300 shares of worthless stock, and unlawfully taking from its treasury the sum of \$30,000, when in fact all their acts, considered as parts of the whole transaction, clearly show that in the end the corporation was no poorer and the defendants no richer than before; that no one was injured by what was done, and no one was even deceived or misled, except the public and the insurance authorities of several foreign states.

The primary difficulty with this contention is that the findings of the referee, all of which are amply sustained by the evidence, expressly negative any legal or contractual connection between the original purchase by the defendants of the 300 shares of Reserve Company's stock and the final sale thereof to the Mercantile Company. The second purchase by the defendants of the same 300 shares of Reserve Company's stock on December 30th, 1895, is characterized by the referee as "an absolute purchase" for \$30,000 in cash, which "became the absolute property of the Mercantile Company;" and while the purchasers *expected* to be relieved by some subsequent action of the directorate of which they constituted a majority, there never was any agreement on the part of the Mercantile Company that it would repurchase the stock. For obvious reasons it was necessary to the plans of the defendants that there should be no such agreement, or at least none in writing.

Assuming for the purposes of this argument, however, that

the defendants' original purchase of the Reserve Company's stock, and its final sale to the Mercantile Company were, to use the language of defendants' counsel, "two phases of one transaction, and two steps in the execution of a single plan," we fail to perceive how that circumstance could operate to relieve the defendants from liability to the plaintiff. As receiver he represents the corporation for the purpose of enforcing all the legal rights and redressing all the legal wrongs of the corporation, upon which it might have maintained actions or suits before the adjudication of its insolvency. Since the *transaction* upon which this action is based was no less a fraud upon the corporation than upon its creditors, the insurance authorities and the public, the corporation might have brought an action for the restoration to its treasury of its wasted funds, and that right of action has clearly devolved upon the plaintiff. This is the simple theory of the complaint, the trial and the judgment. It was a legal wrong and a distinct injury to the corporation to invest it with a credit that was designed to be fictitious, and under color of which the corporation went on incurring obligations that could not have been created if the true purpose of the defendants had been disclosed. When the defendants purchased of the Mercantile Company the 300 shares of Reserve Company stock and placed in the treasury of the Mercantile Company \$30,000 in cash they not only represented to the insurance authorities, the public and to creditors that the corporation was legally qualified to continue its business, but they did in fact increase its capital to the extent of \$30,000. Having done that, they should not now be heard to say that in transferring to the corporation 300 shares of worthless stock and taking out of its treasury \$30,000 in cash they had simply carried out their original intention to perpetrate a fraud, which is as indefensible in law as it is repugnant to good morals. Shorn of all legal sophistry, the case may fairly be summarized thus: The defendants as directors of the Mercantile Company were trustees charged with the duty of administering its affairs honestly and with reasonable prudence. They failed to per-

N. Y. Rep.]

Statement of case.

form this duty, not through excusable neglect, but by actual misfeasance in appropriating corporate funds to their personal use. That was the legal effect of their action, no matter by what name it may be called. Under such circumstances it cannot be doubted that a receiver represents both the corporation and its creditors for the purpose of recovering from the delinquent directors the damages which their misconduct has occasioned to the corporation. (*Mason v. Henry*, 152 N. Y. 529; *O'Brien v. Fitzgerald*, 143 N. Y. 381; *Hun v. Cary*, 82 N. Y. 67; *Atty.-Gen. v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272.)

The judgment herein should be affirmed, with costs.

CULLEN, CH. J., GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment affirmed.

JAMES McKNIGHT, JR., an Infant, by JAMES McKNIGHT, His Guardian ad Litem, Appellant, v. THE CITY OF NEW YORK, Respondent.

LIMITATION OF ACTIONS — SECTION 396 OF THE CODE OF CIVIL PROCEDURE NOT AFFECTED BY CHAPTER 572 OF THE LAWS OF 1886 — INFANCY. Chapter 572 of the Laws of 1886, providing in substance that no action for negligence can be maintained against a municipality having 50,000 inhabitants or over, "unless the same shall be commenced within one year after the cause of action therefor shall have accrued," while it created a special limitation in respect to actions for personal injuries against a particular class of defendants, left that special limitation, like the general limitation prescribed in chapter 4 of the Code of Civil Procedure, subject to suspension during the existence of any of the disabilities specified in section 396, one of which is infancy.

McKnight v. City of New York, 98 App. Div. 622, reversed.

(Argued June 19, 1906; decided October 2, 1906.)

APPEAL, by permission, from a judgment entered December 5, 1904, upon an order of the Appellate Division of the Supreme Court in the first judicial department overruling plaintiff's exceptions ordered to be heard in the first instance

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.]

by the Appellate Division, denying a motion for a new trial and directing a dismissal of the complaint in conformity with the judgment of the Trial Term.

The nature of the action, the facts, so far as material, and the question certified are stated in the opinion.

J. Brownson Ker and *M. P. O'Connor* for appellant. The Statute of Limitations was suspended by the infancy of the plaintiff, and the trial court erred in holding that the cause of action was barred by chapter 572 of the Laws of 1886. (Code Civ. Pro. § 396; *Hayden v. Pierce*, 144 N. Y. 512; *Titus v. Poole*, 145 N. Y. 414; *Hamilton v. R. Ins. Co.*, 156 N. Y. 332; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Matter of Evergreen*, 47 N. Y. 216; *Smith v. People*, 47 N. Y. 330; *People v. St. Lawrence County*, 103 N. Y. 541; *Bowen v. Lease*, 5 Hill, 221; *Rosecrans v. United States*, 165 U. S. 262; *Lucas Co. v. C., etc., R. Co.*, 67 Iowa, 541; *Pratt v. A., etc., R. Co.*, 42 Me. 579.)

John J. Delany, Corporation Counsel (*Theodore Connolly* and *Terence Farley* of counsel), for respondent. Plaintiff's cause of action not having been commenced within one year after it occurred, is barred by chapter 572 of the Laws of 1886. (*Levy v. Newman*, 130 N. Y. 11.) Section 396 of the Code of Civil Procedure, extending the Statute of Limitations in certain cases where the persons affected are under certain disabilities, does not engraft any exception on chapter 572 of the Laws of 1886. (*People ex rel. McCabe v. Snedeker*, 106 App. Div. 89; *Titman v. Mayor, etc.*, 57 Hun, 469; *Barnes v. City of Brooklyn*, 22 App. Div. 520; *Crapo v. City of Syracuse*, 183 N. Y. 395; *Norton v. Mayor, etc.*, 16 Misc. Rep. 303; *Wetjen v. Fick*, 178 N. Y. 223.)

WILLARD BARTLETT, J. This is an action against the city of New York to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant. It was admitted upon the trial that the accident in which the plaintiff was injured occurred on the 15th

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

day of June, 1897, and that this action was not commenced until the 21st day of January, 1902. It was also conceded that at the time of the accident the plaintiff was an infant under the age of fourteen years. Upon these facts counsel for the defendant moved to dismiss the complaint upon the ground that the action was barred by chapter 572 of the Laws of 1886. The learned trial court granted the motion and ordered plaintiff's exceptions to be heard in the first instance at the Appellate Division. There the exceptions were overruled and judgment was rendered in favor of the defendant. From that judgment the Appellate Division has permitted an appeal to this court.

The question presented for determination is whether this action is barred by chapter 572 of the Laws of 1886, which provides, in substance, that no action for negligence is maintainable against a municipality of this state having fifty thousand inhabitants or over "unless the same shall be commenced within one year after the cause of action therefor shall have accrued."

It is the contention of the appellant that this statute was not operative against the plaintiff during his infancy by reason of the exception contained in section 396 of the Code of Civil Procedure, the material part of which reads as follows: "If a person, entitled to maintain an action specified in this title, (which includes negligence actions; see § 383, sub. 5) * * * is, at the time when the cause of action accrues * * * within the age of twenty-one years, * * * the time of such a disability is not a part of the time limited in this title for commencing the action," etc.

Section 396 is found in chapter IV of the Code, which also contains in section 414 the following declaration: "The provisions of this chapter apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in one of the following cases:

1. A case "where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties."

The respondent contends that this exception deprives the infant plaintiff of the benefit of the provisions of section 396, because the act of 1886 (Chap. 572) is a law which specially prescribes a different limitation in a case against a city having 50,000 inhabitants, where the action is brought to recover damages for personal injuries.

We think that this is too narrow a construction. The effect of the one-year limitation prescribed by the act of 1886 was to amend by implication section 383 of the Code of Civil Procedure by reducing the period of limitation in actions for personal injuries due to negligence from three years to one, where the defendant was a municipality with a population of fifty thousand. In this change we can find no evidence of a legislative intent to deprive an injured infant in such cases of the benefit of the general exception contained in section 396 which prevents the Statute of Limitations from running against a claimant while the disability of infancy exists.

"The tendency of the latest decisions of this court has been to extend to all claims the benefit of the exceptions given by the Code of Civil Procedure to the bar of the Statute of Limitations, except where there is an express statute or contract to the contrary." (*Conolly v. Hyams*, 176 N. Y. 403.) This statement in the opinion of CULLEN, J., is sustained by the cases which he cites and it is not necessary to repeat the citations here. The principle which is approved and applied therein demands that in the present case we hold that while chapter 572 of the Laws of 1886 created a special limitation in respect to negligence (personal injury) suits against a particular class of defendants, it left that special limitation, like the general limitations prescribed in chapter 4 of the Code of Civil Procedure, subject to suspension during the existence of any of the disabilities specified in section 396, one of which is infancy.

The learned counsel for the respondent contends that in construing the sections of the Code of Civil Procedure which constitute exceptions to the general Statute of Limitations, the courts have invariably held that they did not extend the

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

period of limitation prescribed by section 572 of the Laws of 1886. We are referred to four cases which are said to sustain this proposition, namely: *Titman v. Mayor, etc., of N. Y.* (57 Hun, 469; affirmed on opinion below, 125 N. Y. 729); *Barnes v. City of Brooklyn* (22 App. Div. 520); *Crapo v. City of Syracuse* (183 N. Y. 395), and *Norton v. Mayor, etc., of N. Y.* (16 Misc. Rep. 303). In the *Titman* case the only question considered was whether an action brought for wrongfully causing death by negligence was an action "for damages for personal injuries alleged to have been sustained by reason of the negligence" of a municipal corporation within the meaning of chapter 572 of the Laws of 1886 so as to be barred by the one-year Statute of Limitations. The applicability of the Code exceptions to the general Statute of Limitations was not considered or discussed therein. In the *Barnes* case it was merely held that a cause of action to recover damages for negligence resulting in the death of the plaintiff's intestate did not accrue until the appointment of an administrator. No such question was considered as that which is involved in the present appeal. The decision in the *Crapo* case was to the same effect. The *Norton* case was a Special Term decision wherein the learned judge who rendered it did express the opinion that the exceptions in section 396 of the Code of Civil Procedure had no application to the act of 1886. There is no discussion of the question, and it is only necessary to say in respect to that case that the view expressed is in conflict with the trend of decisions on the subject in this court, and that we cannot concur in it.

The judgment appealed from must be reversed, the plaintiff's exceptions sustained and a new trial granted, costs to abide the event.

CULLEN, Ch. J., VANN, WERNER and CHASE, JJ., concur; HISCOCK, J., dissents; O'BRIEN, J., absent.

Judgment reversed, etc.

ADOLPH S. KRONOLD, Appellant, v. THE CITY OF NEW YORK,
Respondent.

NEGLIGENCE — LOSS OF INCOME AS AN ELEMENT OF DAMAGE. The fact that the plaintiff, in an action to recover damages for personal injuries, had \$1,000 invested in his business does not justify the trial judge in refusing to submit to the jury the plaintiff's alleged loss of earnings or income as an element of the damages and in excluding proof of the reasonable value of his services or what compensation similar services would command, if he is entitled to a verdict, because there was no evidence to show how much of his income had been derived from his invested capital and how much from his personal efforts; where it appears that his business involved the investment of capital merely as an incident or vehicle to the performance of services almost if not quite personal in their nature, and the amount of his income was about \$3,000 annually; and such ruling constitutes reversible error.

Kronold v. City of New York, 96 App. Div. 636, reversed.

(Argued June 18, 1906; decided October 2, 1906.)

APPEAL, by permission, from a judgment entered upon an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 21, 1904, which affirmed an order of the court at a Trial Term denying plaintiff's motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Theodore Sutro, Boardman *Wright* and *Ralph Barnett* for appellant. Plaintiff's earnings depended entirely on his personal services and individual ability, and did not proceed from an investment of capital; proof, therefore, of the amount of his earnings before and after the accident was competent and material, to lay the basis for an award for loss of earnings and of earning capacity. (*Pill v. B. H. R. Co.*, 6 Misc. Rep. 267; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Simonin v. N. Y., L. E. & W. R. R. Co.*, 36 Hun, 214; *Nash v. Sharpe*, 19 Hun, 365; *Lynch v. B. C. R. Co.*, 5 N. Y. Supp. 311; *Thomas v. U. R. Co.*, 18 App. Div. 185.) Assuming that plaintiff's earnings proceeded partly from an investment of capital, evidence of the reasonable value of his services or of the compensation paid to others engaged in

N. Y. Rep.]

Opinion of the Court, per WERNER, J.

a like business, was competent. (*Matteson v. N. Y. C. R. R. Co.*, 35 N. Y. 487; *Wynne v. Atlantic Ave. R. R. Co.*, 14 Misc. Rep. 394; *affd.*, 156 N. Y. 702.)

John J. Delany, Corporation Counsel (Theodore Connolly and Terence Farley of counsel), for respondent. The rule that lost past profits to a person, as to his business, conducted by a combination of his personal services or other labor and capital, by a partial or total suspension of such business, measuring such profits by some reasonable, definite standard, such as that of profits realized in the same business before it was so wrongfully interfered with, does not apply to consequential damages caused to a person engaged in such business by reason of his being wrongfully injured so as to be partially or totally disabled from attending to the same as usual, either as an independent element of damage, or as a basis of determining loss sustained by such person being injured in his earning power. (*Johnson v. M. Ry. Co.*, 52 Hun, 111; *Orsor v. M. C. T. R. Co.*, 78 Hun, 169, 170; *Blate v. T. A. R. R. Co.*, 29 App. Div. 388; *Read v. B. H. R. R. Co.*, 32 App. Div. 503; *Hewlett v. B. H. R. R. Co.*, 63 App. Div. 423; 1 Sedgwick on Dam. [8th ed.] § 181; 4 Sutherland on Dam. § 1246; Watson on Dam. for Pers. Inj. § 507; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Masterson v. Village of Mount Vernon*, 58 N. Y. 391.) Profits of a business enterprise combining capital and labor do not in any case constitute a legitimate basis for estimating the earning power of one personally contributing the element of labor, in case of his being wrongfully injured so as to be unable as usual to furnish such element. (*Jonas v. I. S. R. Co.*, 45 Misc. Rep. 579; 8 Am. & Eng. Ency. of Law [2d ed.] 625; 1 Sedgwick on Dam. [8th ed.] § 181; 4 Sutherland on Dam. § 1246.)

WERNER, J. This action was brought to recover damages for personal injuries sustained by the plaintiff, and alleged to have been caused by the negligent failure of the defendant to keep in proper repair a crosswalk at the intersection of Elm and Walker streets in the borough of Manhattan. For

the purposes of this discussion we may assume, although we do not decide, that the defendant's alleged negligence and the plaintiff's freedom from contributory negligence were sufficiently established to present questions of fact to be disposed of by a jury, and we shall confine our discussion to the single question whether the learned trial judge properly refused to submit to the jury the plaintiff's alleged loss of earnings or income as an element of the damages which should be awarded to him if he is entitled to a verdict.

At the close of the evidence the learned trial judge announced that he would not submit to the jury the plaintiff's claim for loss of income, because it appeared from his own testimony that he had one thousand dollars of capital invested in his business, and there was no evidence to show how much of his income had been derived from his invested capital and how much from his personal efforts. When this ruling had been made, plaintiff's counsel asked permission to put the plaintiff on the stand for the purpose of interrogating him as to the reasonable value of his services, or what compensation similar services would command. This request was refused and plaintiff's counsel took an exception. The case was then submitted to the jury under a charge in which the income or earnings of the plaintiff from his personal efforts was distinctly excluded from consideration as an element of any damages which might be awarded to him. At the conclusion of the main charge plaintiff's counsel requested the court to instruct the jury that it was for them to consider "the nature of the business in which the plaintiff was engaged, its extent, and the particular part therein transacted by him," and the court replied: "I charge that with the statement that you are not to take into consideration his earnings as testified to by him, for the reason that he stated that he had capital invested." To this modification of his request the plaintiff's counsel excepted, and later he excepted generally to that portion of the charge in which the jury were instructed to disregard the testimony of the plaintiff as to his earnings in his business. These exceptions, when considered in the light of

the evidence, are sufficiently definite, we think, to present for our review the question whether the rulings of the court above adverted to present legal error or not, and a brief synopsis of the plaintiff's evidence on this subject will serve to fix the point of view from which that question should be considered.

Prior to the accident the plaintiff had been engaged in the business of selling Swiss embroideries. He took orders from shirt waist manufacturers, Vantine and others who dealt in such articles. These sales were made from designs or drawings procured from sample embroideries. No considerable stock of these embroideries seems to have been carried by the plaintiff, and the capital which he had invested in his business was approximately one thousand dollars. His office expenses, which included rent and the wages of an office boy, did not exceed six hundred dollars a year. His net income was about three thousand dollars a year, and it is fairly to be inferred from his testimony that this was derived chiefly from his personal efforts as a canvasser or salesman, for he stated: "I really made my living only with my legs and maybe a little head also, but most my legs; of course, I have been laid down; then I had to stop; I did not employ any salesmen or drummers or anything like that; I was myself a salesman and a drummer; out of town sometimes." When we add to this brief but comprehensive statement the suggestion that the amount of the plaintiff's income as compared with the so-called capital invested is, of itself, an almost conclusive argument against the theory that the plaintiff was engaged in a business which yielded profits from capital invested, it will readily be seen that this case should be classed as one involving the investment of an insignificant capital as a mere incident or vehicle to the performance of services almost, if not quite, purely personal in their nature. We so regard the case on principle, but this view is also well sustained by authority. In *Pill v. Brooklyn Heights R. R. Co.* (6 Misc. Rep. 267; *affd.*, 148 N. Y. 747), where the plaintiff was a custom corset maker who maintained a workshop and employed two girls to help

her, it was held competent to prove loss of earnings resulting from the injuries on account of which the suit was brought. In *Ehrgott v. Mayor, etc., of New York* (96 N. Y. 264), also an action to recover damages for personal injuries, the plaintiff was a book canvasser and was permitted to show his earnings prior to his injuries. There the court, speaking through the late EARL, J., illustrated the plaintiff's position by likening it, so far as personal earnings were concerned, to the occupations of the lawyer, the physician and the dentist, whose earnings are the result of their professional skill without capital invested. The lawyer has to have books, and if he is busy enough, he employs clerks to assist him. The physician puts money into instruments, books and medicines. The dentist invests in gold leaf, artificial teeth and tools. And yet their incomes which, to some extent at least, are the product of such investments and expenditures, are classified as personal earnings, the loss of which must be considered as an element of damages in actions for personal injuries. To the same effect are *Simonin v. N. Y., L. E. & W. R. R. Co.* (36 Hun, 214), where the plaintiff was a teacher of French; *Nash v. Sharpe* (19 Hun, 365), where the plaintiff was a dentist; *Lynch v. Brooklyn City R. R. Co.* (5 N. Y. Supp. 311; affd., 123 N. Y. 657), the case of a midwife; *Thomas v. Union Ry. Co.* (18 App. Div. 185), where the plaintiff performed services as gauger for a copartnership of which he was a member; *Waldie v. Brooklyn Heights R. R. Co.* (78 App. Div. 557), the case of a licensed pilot, and numerous other cases involving a variety of occupations, in which the element of personal earnings has been held to predominate over a small and purely incidental or supplemental investment of capital.

The cases above cited, as well as the case at bar, are clearly distinguishable, we think, from *Masterton v. Village of Mt. Vernon* (58 N. Y. 391); *Marks v. Long Island R. R. Co.* (14 Daly, 61); *Boston & Albany R. R. Co. v. O'Reilly* (158 U. S. 334), and other cases relied upon by counsel for the respondent and the courts below, because these latter decisions are all based upon facts which disclose such a preponderance

N. Y. Rep.]

Statement of case.

of the business element over the personal equation, or such an admixture of the two, that the question of personal earnings could not be safely or properly segregated from returns upon capital invested, in considering the damages to which the several plaintiffs claimed to be entitled.

In the case at bar there was not only evidence which tended properly to show that the plaintiff had sustained damages through loss of personal services, but competent evidence bearing upon the same subject was excluded, and we think the refusal of the learned trial court to submit to the jury the former, as well as its ruling excluding the latter, constitutes legal error, which entitles the plaintiff to a new trial.

In this view of the case we deem it unnecessary to discuss other questions that may not be again presented.

The judgment below should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., VANN, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur; O'BRIEN, J., absent.

Judgment reversed, etc.

JOHN C. WARREN, Respondent, v. EDWARD S. PARKHURST et al., Appellants, Impleaded with Others.

1. RIPARIAN RIGHTS—WHEN LOWER RIPARIAN OWNER MAY MAINTAIN ACTION AGAINST A NUMBER OF UPPER RIPARIAN OWNERS TO RESTRAIN THEM ALL, ALTHOUGH ACTING SEPARATELY, FROM POLLUTING THE WATERS OF A STREAM. The owner of land abutting upon a canal, maintained from time immemorial for the purpose of leading the greater part of the waters of a stream to certain large mills, there to be used for power, may maintain an action in equity to restrain a number of corporations and persons, some sued simply as individuals and some as members of copartnerships, doing business on premises abutting upon the upper waters of the stream, from discharging tannery and factory refuse and other filthy substances into the stream, thereby polluting the waters and bed and banks of the stream and occasioning offensive deposits in the canal and upon the land of the plaintiff, whereby the comfort of the plaintiff and his tenants was destroyed, the premises rendered unhealthful and the value thereof diminished.

2. PLEADING — WHEN COMPLAINT IN SUCH ACTION NOT DEMURRABLE. The complaint in such action, considered as a bill in equity to restrain the further pollution of the stream by the defendant, is not demurrable upon the grounds: (1) "That it fails to state facts sufficient to constitute a cause of action" in that "The damages suffered by the plaintiff from the pollution of the stream by any one defendant, if there were no other sources of pollution, would be nominal;" and (2) upon the ground of "multifariousness, in that it commingles and blends certain alleged causes of action against certain defendants separately, which are not good against them jointly and do not affect all the defendants," where it is alleged that the injury suffered by plaintiff arises from the concurring and continuous trespass and wrongdoing of all the defendants, and that, if continued, the acts of the defendants will constitute a permanent nuisance and an irreparable injury to the premises and property rights of the plaintiff; since the acts of the defendants may be independent and several, but the results of these several acts combine to produce whatever damage or injury the plaintiff suffers, and in equity constitute but one cause of action.

Warren v. Parkhurst, 105 App. Div. 239, affirmed.

(Argued June 14, 1906; decided October 2, 1906.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 13, 1905, which affirmed an interlocutory judgment of the court at a Trial Term overruling a demurrer to the complaint.

The demurrer specified two objections: *First*, that the complaint did not state facts sufficient to constitute a cause of action; and, *second*, that causes of action had been improperly united, the specific defect of the complaint in this respect being stated to be "multifariousness, in that it commingles and blends certain alleged causes of action against certain defendants separately, which are not good against them jointly and do not affect all the defendants." The Appellate Division certified the following questions to the Court of Appeals: (1) Does the complaint state facts sufficient to constitute a cause of action? (2) Are causes of action improperly united in the complaint, for the reasons stated in the defendants' demurrer?

Frank Burton and *William A. McDonald* for appellants. The demurrer should have been sustained as the complaint

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

does not state facts sufficient to constitute a cause of action against these defendants jointly and severally in that it fails to state facts showing that there is between the defendants either a unity of title or of act, or community of interest, or legal concurrence in creating the alleged nuisance; if the complaint alleges any kind of an action it is one against the defendants severally. (*Chipman v. Palmer*, 77 N. Y. 51; *Keyes v. L. Y. G. W. & W. Co.*, 53 Cal. 724; *Sellick v. Hall*, 47 Conn. 260; *L. S. N. R. & C. Co. v. Richards*, 57 Penn. St. 142; *Loughram v. City of Des Moines*, 72 Iowa, 386; *Sloggy v. Dilworth*, 38 Minn. 179; 15 Ency. of Pl. & Pr. 675; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Fellows v. Fellows*, 4 Cow. 682.)

Thomas J. McDermott, Andrew J. Nellis and M. D. Murray for respondent. The complaint states a good cause of action against all the defendants collectively. (*M. V. Co. v. Santa Barbara*, 144 Cal. 578; *Lockwood Co. v. Lawrence*, 77 Me. 297; *Sage v. Culver*, 147 N. Y. 241; *Wallace v. Jones*, 182 N. Y. 37; *Marie v. Garrison*, 83 N. Y. 14; *Kain v. Larkin*, 141 N. Y. 144; *Trueb v. N. Y. A. Mfg. Co.*, 16 Misc. Rep. 482; *Milliken v. W. U. T. Co.*, 110 N. Y. 403; *Wenk v. City of New York*, 171 N. Y. 607; *Corey v. Rice*, 4 Lans. 141.)

WILLARD BARTLETT, J. This action is brought against forty defendants in the city of Gloversville. Some of them are corporations, some are sued simply as individuals, and others are sued as members of copartnerships. Most of them are engaged in business as tanners and colorers of skins and manufacturers of leather.

The material allegations of the complaint may fairly be summarized as follows: The defendants, for a period of six years, have been carrying on business on the premises of each, which premises are situate on or near Cayadutta creek and the headwaters thereof, which creek, but for the wrongful acts of the defendants hereinafter stated, and of the city of

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.

Gloversville and others, is and has been a large stream of pure and wholesome water of equable flow ordinarily contained within its banks, flowing through the town and city of Johnstown into the Mohawk river. In the city of Johnstown there has been maintained from time immemorial a canal upwards of half a mile in length, leading the great bulk of the waters of Cayadutta creek westerly to certain large mills, there to be used for power. The plaintiff, for the last ten years, has owned, and now owns, a lot of land and dwelling house on this canal, occupied for residential purposes and the maintenance of a meat market. The defendants for the last six years have discharged, and do now discharge, each from his own place of business into Cayadutta creek, large quantities of filthy matter and tannery and factory refuse and harmful and polluting substances, solid and liquid, thereby polluting the waters and bed and banks of the creek, rendering them offensive to the senses and occasioning deposit in the canal and upon the lands of the plaintiff thereon, rendering them less useful for domestic purposes. By reason of this pollution of the canal disagreeable and noxious odors have arisen, continually pervading the plaintiff's dwelling house and meat market, destroying the comfort of the plaintiff and his tenants in the use of his property and diminishing the value thereof and rendering the premises unhealthful. Each defendant maintains permanent drains and sluices for carrying such refuse and polluting and harmful substances into Cayadutta creek, and intends to continue such discharge thereof and to increase the same unless restrained from so doing. "The damages suffered by the plaintiff from the pollution of the stream by any one defendant, if there were no other sources of pollution, would be nominal; but from the concurring and continuous trespass of all the defendants, the injury which the plaintiff and his lands sustain is great and if the said nuisance is continued will be irreparable and the said lands and tenements will be rendered wholly worthless for domestic or for other purposes."

The complaint concludes with a prayer for an injunction

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

and that the plaintiff recover of the defendants \$1,000 for the damages which he has already suffered.

Considered as a bill in equity to restrain the further pollution of the waters of Cayadutta creek by the defendants, I think that the complaint states a cause of action and is not objectionable on the ground of multifariousness. Whether it would be good if the plaintiff sought only to recover damages at law, it is not necessary now to decide.

The principles of equity jurisprudence applicable to the determination of this appeal have never been more clearly stated by any tribunal in the United States or more thoroughly or ably discussed than in the opinion of the Supreme Judicial Court of Maine in the case of *Lockwood Co. v. Lawrence* (77 Me. 297). The nuisance which was the subject of complaint in that case arose out of the deposit in a river of the waste from sawmills by several owners and proprietors of such sawmills acting independently of one another. The refuse material and debris arising from the operation of their separate sawmills was carried down the river and commingled into one indistinguishable mass before it reached the premises of the complainant, where it was deposited in such quantities as to constitute a nuisance. Objection was made to the joinder of the several defendants in one bill on the ground that the cause of action was distinct and several as against each of them, it being expressly alleged in the bill that each was independently working his own sawmill without any conspiracy or preconcert of understanding or action with the others. This objection was held to be untenable, inasmuch as there was co-operation in fact in the production of the nuisance. "The acts of the respondents," said FOSTER, J., "may be independent and several, but the result of these several acts combine to produce whatever damage or injury these complainants suffer, and in equity constitutes but one cause of action."

Another leading case in which the same rule was applied is *Draper v. Brown* (115 Wis. 361), which was a suit in equity against a number of defendants to restrain the commission of

acts resulting in a nuisance and consequent injury of the property of the plaintiff. The gravamen of the action was the unlawful lowering of the waters of a lake below their accustomed level, the plaintiff alleging that some of the defendants who owned a mill dam at the outlet of the lake drew an excessive quantity of water therefrom; that other defendants withheld the natural flow of a river running into the lake, and that still another obstructed the flow of the river, thereby diminishing the quantity of the water which reached the lake. It was contended that two or more causes of action were improperly united in the complaint, but the court held that the complaint stated but one cause of action in which all the defendants were interested inasmuch as though all the defendants acted independently and without concert their acts united and concurred in producing the injurious result. The fact that the parties were acting without concert was declared to be no defense to an equitable action for injunctive relief if their acts contributed in some appreciable degree to produce the conditions sought to be repressed.

To the same effect is the decision in *Woodruff v. N. B. G. M. Co.* (8 Sawy. Cir. Ct. 628), which was a bill against a number of hydraulic mining companies in California, severally owning mines at various points on the Yuba river and its affluents and working them independently of each other. The relief sought was an injunction to restrain the defendants from discharging the mining debris arising from the operation of their several mines into the streams, it appearing that the debris became mingled therein into an indistinguishable mass and was deposited upon the lands of the complainant so as to constitute a great public and private nuisance. There was a demurrer to the bill on the ground of misjoinder and multifariousness and it was contended in particular that inasmuch as each defendant was pursuing its own business severally without any joint intent or joint action the cause of action was distinct and several as against each and that neither the defendants nor the several causes of action could be joined in the same suit.

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

In overruling the demurrer SAWYER, C. J., declared that after a very careful examination and analysis of the numerous authorities cited in support of the proposition stated he was entirely satisfied that under the principles of equity jurisprudence as established in England and in the United States there was no misjoinder of defendants and that the bill was not multifarious. Among other things he said: "The nuisance is created by the joint action of the debris from the various mines, which is combined, and afterwards flows on together, long before it reaches the lands injured and threatened, and after such combination creates the nuisance complained of. There is, therefore, a co-operation in fact, if not in intent, of these several defendants in the production of the nuisance. The injury is the joint effect of acts, originally several, but combined before the debris is precipitated upon the lands below and the injury is effected, and in contemplation of equity it constitutes a single cause of action. There is a common interest in the right claimed to discharge debris into the streams. The defendants each and all claim a common though not a joint right. The final injury is a single one—a single result of the combined operation of this debris—and all the defendants co-operate in fact in producing it. No damages are sought. Only equitable relief is demanded by restraining future action—a future contribution by each to the nuisance."

In the decisions of the English courts we also find precedents for the maintenance of such a suit in equity as that before us. In *Thorpe v. Brumfitt* (L. R. [8 Ch. App.] 650) Thorpe, the lessee of an inn, brought an action against Morrell, Brumfitt and other tenants of Morrell for an injunction to restrain the defendants from blocking up or obstructing a right of way leading to the inn. The obstruction complained was caused by allowing carts and wagons to remain stationary in the passage in course of loading and unloading so as to obstruct access to the yard of the inn. The master of the rolls made a decree declaring that the plaintiffs and the defendants had an equal and reciprocal right to the

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.]

use of the roadway, but that none of the persons interested were entitled to place or to leave any stationary obstruction in such roadway except at such times as the use thereof was not required for any of the other persons interested therein, and he granted an injunction in accordance with this declaration. The decree and injunction were affirmed in the Court of Appeal and Lord Justice JAMES in his opinion sustained the proposition that the acts of several persons may constitute a nuisance which the court will restrain when the damage occasioned by the acts of any one if taken alone would be inappreciable. He said: "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to shew this. Nor do I think it necessary that he should shew it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way that may cause no appreciable inconvenience, but if a hundred do so that may cause a serious inconvenience which a person entitled to the use of the way has a right to prevent, and it is no defense to any one person among the hundred to say that what he does causes of itself no damage to the complainant."

The case last cited goes directly to the question presented here by the express allegation in the complaint that the damages suffered by the plaintiff from the pollution of the stream by any one defendant, if there were no other source of pollution, would be merely nominal. It is argued on behalf of the appellants that the expression of Lord Justice JAMES on this question is merely a dictum; but even if that be true, it seems to me that it is a dictum which embodies a correct statement of the law. It was followed by CHITTY, J., in *Lambton v. Mellish* (L. R. [3 Ch. Div. 1894] 163), where the head note correctly states the decision as follows: "The acts of two or more persons may, taken together, constitute such

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

a nuisance that the Court will restrain all from doing the acts constituting the nuisance although the annoyance occasioned by the act of any one of them if taken alone would not amount to a nuisance." The nuisance there under consideration was due to the combination of musical sounds produced by two organs used in connection with certain merry-go-rounds. "If the acts of two persons," said CHITTY, J., "each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint." Although neither of these English cases is the decision of a court of last resort it is to be noted that the principle which they enunciate as to the liability in equity of several persons contributing to a nuisance where the conduct of one alone would not suffice to constitute an actionable wrong was adopted as correct by the Supreme Judicial Court of Maine in the case of *Lockwood Co. v. Lawrence*, already cited, where it is said in the opinion: "In the case at bar, it may be that the act of any one respondent alone might not be sufficient cause for any well-grounded action on the part of the complainants; but when the individual acts of these several respondents, through the combined results of these individual acts, produce appreciable and serious injury, it is a single result, not traceable perhaps to any particular one of these respondents, but a result for which they may be liable in equity as contributing to the common nuisance."

I have examined all the cases cited in behalf of the appellants and I find none which is an authority against the right of the plaintiff to maintain the present action except the case of *Keyes v. Little York Gold Washing & Water Co.* (53 Cal. 724), decided in November, 1878, but subsequently overruled. This was a suit by the owner of bottom lands upon a river to enjoin a number of miners at points higher up on the river from depositing the tailings of their several mining claims so that they reached the channels of the river and were swept down and were deposited upon the lands of the plaintiff. The court sustained the demurrer to the complaint upon

the ground that it did not appear that the defendants had jointly committed any of the acts alleged, or that they were acting in concert or by collusion with each other. The decision, therefore, at the time when it was rendered was authority for the proposition that several wrongdoers acting independently could not be joined in an equitable proceeding to procure an injunction against all of them.

A different view was taken by the same tribunal in November, 1880, when the personnel of the court had so changed that only one judge remained in it who had participated in the previous decision. This was in the case of *Hillman v. Newington* (57 Cal. 56), where the plaintiff sued a number of persons to recover damages for the wrongful diversion of the water of a stream, and to perpetually enjoin them from diverting the same. The defendants answered that they were improperly enjoined in the action because they acted severally and not jointly. The court held that the action was maintainable, saying: "It is not at all improbable that no one of the defendants deprives the plaintiff of the amount to which he is entitled. If not, upon what ground could he maintain an action against any of them? If he were entitled to all the water of the creek, then every person who diverted any of it would be liable to him in an action. But he is only entitled to a certain specific amount of it, and if it is only by the joint action of the defendants that he is deprived of that amount, it seems to us that the wrong is committed by them jointly, because no one of them alone is guilty of any wrong. Each of them diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that without unity or concert of action, no wrong could be committed; and we think that in such a case, all who act must be held to act jointly." It is a curious fact that in this *Hillman* case the opinion does not refer to the prior decision the other way in the *Keyes* case, although the *Keyes* case was cited in the briefs of counsel. The fact that the *Keyes* case has been overruled is

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

recognized, however, in subsequent decisions on this same branch of the law by the Supreme Court of California. (*People v. Gold Run D. & M. Co.*, 66 Cal. 138; *Miller v. Highland Ditch Co.*, 87 Cal. 480, 433.)

An examination of the *Hillman* case shows that the court there held, not only that an equitable action was maintainable by a lower riparian owner against a number of upper riparian owners to restrain the wrongful diversion of water, but that damages were also recoverable against such defendants in one suit. Only nominal damages (\$1.00) were awarded by the judgment, however, and a later decision in California (*Miller v. Highland Ditch Co.*, *supra*) has modified the *Hillman* case to this extent, so as to hold that while several tort-feasors, not acting in concert or by unity of design, are not liable to a joint action for damages, although the consequences of their several torts have united to produce an injury to the plaintiff, they are liable to be *enjoined* by decree from the continuance of their tortious acts. The latest California case in which this proposition is asserted appears to be *Montecito Valley Co. v. Santa Barbara* (144 Cal. 578, 595) which was an action brought by a plaintiff claiming a property right to take water from a stream against several defendants who were alleged to be diverting water from the stream to the injury of the plaintiff. There was no claim for damages against the defendants as general tort-feasors, but merely a prayer for injunctive relief. It was held that an action might be brought to restrain independent diverters of the waters of a stream to the injury of the plaintiff, though not acting in concert or by unity of design.

Chipman v. Palmer (77 N. Y. 51) was not a suit in equity, but an action to recover damages suffered by the keeper of a boarding house near a stream against the keeper of another boarding house further up the stream for polluting the stream by sewerage. The injury appeared, however, to be caused not by the act of the defendant alone, but by the conduct of other persons who also discharged sewerage into the stream. It was merely held that, under these circumstances, the plaintiff could

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.

not recover as against the defendant alone *all the damage he had sustained*. MILLER, J., concedes that an equitable action will lie to restrain parties who severally contribute to a nuisance, and merely asserts "that where different parties are engaged in polluting or obstructing a stream, at different times and places, *the whole damages* occasioned by such wrongful acts *cannot be collected of one of the parties*" (p. 56).

The case of *Sellick v. Hall* (47 Conn. 260) is not an authority for the appellants. There the defendant had constructed a covered channel for a small brook that ran through his premises in the city of Norwich. This channel obstructed the flow of water that came down the brook in heavy rains and caused the water to overflow on the adjoining premises of the plaintiff. The suit was for damages to the plaintiff's property occasioned by this overflow. It appeared that the city of Norwich had constructed sewers which emptied into the brook above the defendant's premises and added to the volume of the stream. The court, among other things, held that the defendant and the city could not be regarded as joint tort-feasors. The defendant was said to be liable, if at all, because his insufficient channel was a nuisance, whereas the liability of the city was for pouring into the stream a quantity of water and sewage for which there was no sufficient channel. The court declared that the torts of the defendant and the city had in law nothing in common, there being not even a juxtaposition of the wrongful acts, one being the maintenance of an insufficient channel by the defendant and the other a letting in of an increased volume of water and sewage from artificial drains and sewers. It hardly needed any argument in this case to show that the torts were not joint, and there is no claim in the case at bar that the action of the defendants in polluting Cayadutta creek was joint in the sense of being inspired by a common purpose. That the acts were concurrent, however, if the allegations of the complaint are taken as true, does not admit of doubt.

The case of *Little Schuylkill Navigation Co. v. Richards*

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

Administrator (57 Pa. St. 142) was not a suit in equity but an action at law to recover damages for throwing dirt into a stream, which was carried down and deposited upon the lands of the plaintiff. It was held that the defendants were only severally liable at law for their acts, and that damages could not be recovered against them as joint tort-feasors.

Sloggy v. Dilworth (38 Minn. 179) merely holds that so far as damages are concerned they are not recoverable against the defendants jointly unless they are shown to be acting jointly in the premises. This is apparent from the following extract from the opinion of the court: "If waters are wrongfully turned upon the land of another as the result of the acts of several parties, they are all liable. It is no defense that the injury caused or wrong done by any one, standing alone, might not be sufficient ground of complaint. If the damage caused is the combined result of several acting independently, recovery may be had severally in proportion to the contribution of each to the nuisance, and not otherwise."

None of the other cases cited in the brief for the appellants bears sufficient resemblance to the case at bar to require discussion.

I think that the judgment of the Appellate Division should be affirmed, with costs, and that the first question should be answered in the affirmative and the second question in the negative, with leave to defendants to withdraw demurrer and serve answer within twenty days on payment of costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN and WERNER, JJ., concur; CHASE, J., not sitting.

Judgment affirmed.

EZEKIEL C. M. RAND, Appellant, v. IOWA CENTRAL RAILWAY
COMPANY, Respondent.

BANKRUPTCY — AN ADJUDICATED BANKRUPT NOT DIVESTED OF TITLE TO CAUSE OF ACTION UNLESS TRUSTEE HAS BEEN APPOINTED. A plaintiff is not precluded from recovering in an action for services rendered to the defendant by reason of the fact that he was adjudicated a bankrupt after the cause of action had accrued in his favor and before the beginning of the suit, where no trustee in bankruptcy was ever appointed.

Rand v. Iowa Central Ry. Co., 96 App. Div. 413, reversed.

(Argued June 20, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 2, 1904, affirming a judgment in favor of defendant entered upon a decision of the court at a Trial Term directing that a verdict in favor of plaintiff be set aside and that the complaint be dismissed.

The nature of the action and the facts, so far as material, are stated in the opinion.

F. K. Pendleton, *Aaron P. Jetmore* and *Ellery O. Anderson* for appellant. The plaintiff by his adjudication in bankruptcy was not divested of title to the claim herein sued upon because no trustee was appointed in the proceeding in whom title vested by virtue of section 70a of the act of 1898. (*Matter of Pease*, 4 Am. Bank. Reg. 578; *McDonnell v. Bauendahl*, 4 Hun, 265; *Matter of Eagle*, 5 Am. Bank. Rep. 372; *B. Nat. Bank v. Blaker*, 6 Am. Bank. Rep. 19.) The plaintiff is the real party in interest and entitled to maintain this action against the defendant. (*Fuller v. Jameson*, 184 N. Y. 605; *Hunter v. Allen*, 106 App. Div. 559; *Sutherland v. Davis*, 42 Ind. 26; *Wood v. Baker*, 60 Hun, 337.) The claim that defendant by payment of a judgment herein to plaintiff would not be protected if thereafter sued for the same cause of action by any trustee of the bankrupt estate who might be appointed is without foundation. (*Griffin v.*

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

M. L. Ins. Co., 11 Am. Bank. Rep. 623; *Hunter v. Allen*, 106 App. Div. 559; *Gilmore v. Bangs*, 55 Ga. 404; *Thatcher v. Rockwell*, 105 U. S. 467; *Babbitt v. Burgess*, 2 Fed. Cas. 693; *Ex parte Forster*, 9 Fed. Cas. 4960; *Wood v. Baker*, 60 Hun, 337; *Coleman v. Riggs*, 61 Iowa, 543; *La Fontaine v. Savings Bank*, 56 Vt. 333.)

Arthur H. Van Brunt for respondent. By his adjudication as a bankrupt, plaintiff was deprived of all right to deal with any property rights of which he was possessed at the time of the filing of the petition. (*Matter of Gutman*, 114 Fed. Rep. 1009; *Matter of Smith*, 132 Fed. Rep. 301; *Matter of Mertens*, 134 Fed. Rep. 101; *Bank v. Sherman*, 101 U. S. 406; *Keegan v. Keegan*, 3 Am. Bank. Rep. 79; *Matter of Winter*, 1 Am. Bank. Rep. 481; *Matter of Vogel*, 2 Am. Bank. Rep. 427; 3 Am. Bank. Rep. 198; *Matter of Rosenberg*, 3 Am. Bank. Rep. 180; *Matter of Rogers*, 125 Fed. Rep. 169; *Matter of Pekin Plow Co.*, 112 Fed. Rep. 308; *Matter of Garcewich*, 115 Fed. Rep. 87.) Payment of the judgment herein to the plaintiff would not protect the defendant from a claim against any trustee of the bankrupt estate who may be appointed by the bankruptcy court, and, therefore, plaintiff cannot maintain this action. (*Rand v. Sage*, 102 N. W. Rep. 864; *Stevens v. Mechanics' Savings Bank*, 3 Am. Rep. 325; *May v. M. Nat. Bank*, 3 Am. Rep. 573; *Babbitt v. Burgess*, 2 Fed. Cas. 693.)

WILLARD BARTLETT, J. The plaintiff in this action recovered a verdict of \$2,840.00 for services alleged to have been rendered to the defendant corporation. Notwithstanding the verdict the court at Trial Term, by consent of counsel, entertained and finally granted a motion to dismiss the complaint. The judgment thereupon rendered has been affirmed by the Appellate Division upon the ground that the plaintiff had been divested of all title to the claim in suit by reason of the fact that he was adjudicated a bankrupt after the cause of action had accrued in his favor and before the beginning of

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.]

this suit. The adjudication in bankruptcy was deemed to have this effect, although no trustee in bankruptcy was ever appointed.

It is apparent from the record that the omission to appoint a trustee must have been due to the failure of the plaintiff to disclose the existence either of this claim or any other property in the bankruptcy proceedings. While the concealment of any property on the part of a bankrupt must be deemed a reprehensible act as toward his creditors it by no means follows that such concealment has any bearing upon the question as to whether the bankruptcy proceedings have gone far enough to divest the bankrupt of title. In our judgment the proceedings in the case of the plaintiff had not progressed sufficiently to deprive him of the right to maintain an action in his own name in the state court upon the claim in suit. The Bankruptcy Act of 1898 (section 70) provides that the trustee of the estate of a bankrupt upon his appointment and qualification shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt. It is plain that this provision can never become effective until a trustee in bankruptcy shall have been appointed. Here none was appointed; hence the conditions did not exist which were requisite to render this provision of section 70 operative.

Such was the view necessarily adopted by this court in affirming the judgment in the case of *Fuller v. Jameson* (184 N. Y. 605) where the case turned upon the question whether the title to insured property had been changed by reason of an adjudication in bankruptcy against the owner, the insured property having been burned after the referee in bankruptcy had announced the appointment of a receiver but before the order of appointment was actually signed. We agreed with the courts below that the bankruptcy proceedings had not gone far enough at the time of the fire to divest the insured of his title.

If that conclusion was correct it follows that the present judgment cannot be sustained. The proposition of law involved in that decision was that under section 70 of the

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

Bankruptcy Act of 1898 the appointment of a trustee is essential to divest the bankrupt of a title to his property. As was said by the Supreme Judicial Court of Massachusetts in another litigation growing out of the same fire: "No change of title was effected until the appointment and qualification of the trustee." (*Fuller v. New York Fire Ins. Co.*, 184 Mass. 12.) So here the plaintiff's title to the chose in action, which is the basis of the present suit, did not pass out of him in the bankruptcy proceedings since no trustee was appointed to whom it could pass.

But it is urged that the defendant by payment of a judgment herein to the plaintiff would not be protected if it should thereafter be sued upon the same cause of action by any trustee of the bankrupt estate who might hereafter be appointed. It seems to us that the defendant is not exposed to any serious danger in this respect. "If in such cases there is a recovery, and any question arises as to the right of the trustee or creditors to the money, or as to the defendant's being protected in paying it to the proper party, this may be secured by subsequent steps being then taken for that purpose." (*Griffin v. Mutual Life Ins. Co.*, 11 Am. Bank. Rep. 622.) We see no reason why such steps should not be taken if necessary by means of an application to the Bankruptcy Court. It may very well be that any sum recovered by the plaintiff in the present action will be held by him as trustee for his creditors; but this is a matter which does not concern the defendant so long as the plaintiff holds the legal title to the claim and the defendant is secured against any possibility of being compelled to pay it twice.

We do not overlook the fact that the conclusion which we have reached upon the principal question presented by this appeal is in conflict with the view expressed by the Supreme Court of Minnesota in *Rand v. Sage* (102 N. W. Rep. 864); but while entertaining the highest respect for that learned tribunal, we remain satisfied with the correctness of our own decision in *Fuller v. Jameson* (*supra*), which, as has already been pointed out, is in harmony with the construction put upon

section 70 of the Bankruptcy Act by the Supreme Judicial Court of Massachusetts.

It follows that the judgment of the Appellate Division and the judgment entered upon the dismissal of the complaint must be reversed and a new trial granted, costs to abide the event.

We are asked by counsel for the appellant to direct judgment in favor of the plaintiff upon the verdict, but so far as the action of the trial court and Appellate Division set aside that verdict, it involved a question of fact, and is, therefore, not subject to review by this court, especially as the Appellate Division expressed the opinion that the verdict was against the evidence.

CULLEN, Ch., J., VANN, WERNER, HISCOCK and CHASE, JJ., concur; O'BRIEN, J., absent.

Judgment reversed, etc.

EVELINA BRACHER, Respondent, v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellant.

LIFE INSURANCE POLICY — DEDUCTION OF SEMI-ANNUAL PREMIUM FROM AMOUNT DUE. Where a life insurance policy, the premium of which was made payable semi-annually, contained the condition, which in terms was made part of the contract of insurance, that "Although the contract is based on the receipt of premiums annually in advance, the premium may be made payable in semi-annual or quarterly installments in advance, but in such case any future installments which at the maturity of the contract are necessary to complete the full year's premium shall be deducted from the amount of the claim," and the insured died during the first half of a policy year, the semi-annual premium for that period having been paid, the insurance company is entitled to deduct from the policy the semi-annual premium for the second half of the insurance year.

Bracher v. Equitable Life Assur. Society, 103 App. Div. 269, reversed.

(Argued May 23, 1906; decided October 2, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 15, 1905, reversing a judgment in favor of defendant entered

N. Y. Rep.]

Points of counsel.

upon a decision of the court at a Trial Term without a jury and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles W. Pierson and *William C. Diamond* for appellant. The decision appealed from gives no effect whatever to the provision of the contract relied upon by defendant, and thus violates the fundamental rule of construction that effect must be given, if possible, to every clause and word of the contract. (*Savage v. Howard Ins. Co.*, 52 N. Y. 502; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; *Kratzenstein v. Western Assurance Co.*, 116 N. Y. 54; *Douglas v. K. L. Ins. Co.*, 83 N. Y. 492.) The provisions of the contract are clear, unmistakable and unambiguous and entitle the defendant to make the deduction in question. (*Miller v. H. & S. J. R. R. Co.*, 90 N. Y. 430; *Kratzenstein v. W. A. Co.*, 116 N. Y. 54.)

Raphael J. Moses and *James A. Hudson* for respondent. The policy under consideration is a six months' period insurance contract, renewable in six months' periods at the option of the insured by the payment of \$383.90 on or before the day of the expiration of a six months' period. (*Schoonmaker v. Hoyt*, 148 N. Y. 425.) That part of the policy under which defendant claims the right to withhold payment of the \$383.90 of the \$10,000 promised to be paid, is language of uncertain meaning. (*Jannek v. M. L. Ins. Co.*, 162 N. Y. 574; *Marshall v. C. T. Assn.*, 170 N. Y. 434.) The policy contains, on its face, a plain, clear, direct and explicit promise to pay \$10,000, and there are no subsequent clauses or paragraphs in the instrument, or annexed to it, that are so clear and free from ambiguity of language or doubt of application as to fairly warrant an inference that the insurer had reason to suppose that the assured understood that the promise to pay \$10,000 was in any way affected thereby. (*Wordsworth v. J. & T. Co.*, 132 N. Y. 540; *Allen v. S. L. Ins. Co.*, 85 N. Y. 473; *Dilleber v. H. L.*

Ins. Co., 69 N. Y. 256; *Fowler v. M. L. Ins. Co.*, 3 B. & S. 917; *People v. Mer. Credit*, 166 N. Y. 416.)

CULLEN, Ch. J. This appeal presents the single question of the construction of the condition of an insurance policy by which the defendant, in consideration of a payment in advance of \$383.90, and of a payment of the same sum on or before the 9th day of February and August in every year thereafter during the life of the insured, agreed to pay upon the death of the insured to the plaintiff the sum of \$10,000. The third condition of the policy, which in terms was made part of the contract of insurance, provides: "Although the contract is based on the receipt of premiums annually in advance, the premium may be made payable in semi-annual or quarterly installments in advance, but in such case any future installments which at the maturity of the contract are necessary to complete the full year's premium shall be deducted from the amount of the claim." The insured died on November 16th, 1902, and the controversy is over the premium which, had the insured lived, would have become payable on February 9th, 1903. The defendant claimed the right, under the condition above quoted, to deduct this from the policy, the deceased having died in the first half of the policy year. The trial judge decided the controversy in favor of the defendant, and the judgment entered on his decision has been reversed by the Appellate Division by a divided court.

We are of opinion that the view taken by the trial judge was correct. The decision of the Appellate Division gives no effect to the condition of the policy above recited. This is conceded by the learned judge who wrote for the majority of the court, who held that the condition had no application to this policy, which instead of providing for an annual premium provided for semi-annual premiums. He further thought that the condition was inconsistent with the absolute obligation on the face of the policy to pay the sum of \$10,000. We entertain a different view and think that the condition is

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

particularly applicable to policies of the character of the one before us. There is the express declaration that the contract is based on the receipt of the premiums annually in advance, and this is followed by the statement, not that annual premiums are payable in semi-annual or quarterly installments in advance, but that the premium "may be made payable" in such manner. In this policy the premium has been made payable semi-annually, and this fact brings it exactly within the conditions. If, in truth, the policy was issued on the basis of an annual premium, as is declared, then the propriety of the deduction of subsequently accruing installments during the policy year is apparent. Had the premiums been made payable annually the defendant would have received in advance the same sum it now seeks to deduct. If, for the convenience of the policyholder or to suit his means, he is allowed to make the payments semi-annually or quarterly there is no reason why the defendant should be at a greater pecuniary loss than if the payment had been made annually. It is not at all a question of interest on the deferred payments, which would be trifling, but of the right of the defendant to receive the principal of those payments. Nor is there any necessary inconsistency between the promise to pay the \$10,000 and the right to deduct the unpaid premium of the policy year. Had the deceased died in the second half of the policy year no deduction would be made, for then the whole annual premium would have been paid. We think no other conclusion can be reached unless we discard the express statement that the policy is based on an annual premium, a statement supported by other provisions in the policy which give the exact value of the policy for cash, for loans and for paid-up life policies at the end of each year.

The order of the Appellate Division should be reversed and the judgment of the Trial Term affirmed, with costs in both courts.

GRAY, EDWARD T. BARTLETT, VANN and HISCOCK, JJ., concur; HAIGHT and WERNER, JJ., dissent.

Order reversed, etc.

EDWARD H. LITCHFIELD, Appellant, v. EDWARD A. POND
et al., Respondents.

1. PUBLIC OFFICERS—UNAUTHORIZED ACTS OF STATE ENGINEER IN MAKING A STATE SURVEY, WHEN A TRESPASS. Where the agents of the state, for the purpose of establishing a boundary line between counties, enter upon private land, without statutory authority and without the consent of the owner, and appropriate a strip of land three and a quarter miles in length and several feet wide, fell trees thereon and otherwise damage the property, such acts constitute a trespass for which said agents are individually liable. While the state has the right to enter upon private lands for the purpose of surveying and locating boundary lines, its agents exceed their lawful powers when, without provision for compensation, they inflict substantial and permanent damages upon such property in locating a permanent base line, although the work is done with due care and skill.

2. EXERCISE OF POLICE POWER NOT WARRANTED. In the absence of any overwhelming necessity or emergency requiring immediate action, the police power cannot be properly invoked to justify such action.

3. EXERCISE OF POWER OF EMINENT DOMAIN NOT AUTHORIZED BY STATUTE DIRECTING SURVEY. Nor does a statute (L. 1902, ch. 473) directing the state engineer to "locate, establish and permanently mark upon the ground" the boundary line in dispute and appropriating \$40,000 for the purposes of the act, authorize him, as an agent of the state, to exercise the power of eminent domain in order to effect the purpose of the act, in the absence of any indication of an intent to confer such power and of any provision for compensation for private property to be taken and destroyed.

4. SUBSEQUENT STATUTE INEFFECTIVE AS A RATIFICATION BY THE STATE. Nor does a statute (L. 1903, ch. 348) enacted subsequently to the trespass, even if authorizing the taking or invasion of private property for public use, afford any protection to the wrongdoers as against the owner where his property has been taken before its passage.

5. GENERAL POWER OF THE STATE TO MAKE A SURVEY INSUFFICIENT AS A JUSTIFICATION. Nor can the trespass be justified as having been committed in the exercise of the general and inherent power of the state in making a survey for the establishment of disputed boundary lines between counties; while the state may, through its agents, enter upon and temporarily occupy private lands, or even commit acts thereon that are ordinarily classified as technical trespasses without becoming liable to compensate the injured owner, there is immunity from liability only to the extent that the entry or occupation is temporary, or the infliction of dam-

N. Y. Rep.]

Statement of case.

age is incidental and incipient or preliminary — if the occupation is to be permanent or the damage is to be substantial, then the state and those assuming to act under it must invoke those powers under which such things may lawfully be done.

6. CONSTITUTIONAL LAW — ACTS CONSTITUTING A TAKING OF PROPERTY. Such an entry and occupation is a taking of property within the meaning of the State and Federal Constitutions.

7. REMEDY OF LANDOWNER NOT CONFINED TO COURT OF CLAIMS. The fact that by an act passed after the commission of the trespass (L. 1904, ch. 561) the Court of Claims was authorized to determine the damages resulting from such trespass, does not relegate the landowner to that court as the only forum in which he can prosecute his claim therefor, where such act expressly disclaims the creation or acknowledgment of any liability upon the part of the state.

8. THE STATE NOT LIABLE FOR THE TORTIOUS ACTS OF ITS OFFICIALS. The state as an entity cannot commit a trespass. It is liable for the tortious acts of its officers or agents only in special instances expressly created by law. When, therefore, public officers assume to act for the state, and although acting in good faith and believing themselves authorized to act for it, take and destroy property without due process of law and just compensation, their acts, being contrary to law, cannot be the acts of the state, but are their individual acts, for which they alone are responsible; and an action is maintainable against them personally to restrain the further commission of such unlawful acts and to recover the damages already accrued.

Litchfield v. Bond, 105 App. Div. 229, reversed.

(Argued June 8, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 22, 1905, affirming a judgment in favor of defendants entered upon the report of a referee.

The plaintiff is the owner of some nine thousand acres of land, situated in the southwesterly corner of Franklin county, in this state, of which he has made a park; inclosed by a steel wire fence, stocked with large and small game and, more or less, laid out in carriage drives. The defendants are the state engineer of this state and his assistants and this action was brought to restrain them from entering, or doing acts, upon the plaintiff's premises, in effectuating the provisions of

an act of the legislature, relating to the establishment of the boundary lines of certain counties. Upon the trial of the action, the plaintiff's complaint was dismissed, upon the report of the referee before whom the case was tried, and the judgment upon the report has been unanimously affirmed by the Appellate Division, in the third department. The decision of the referee was formulated in findings and, therefore, so far as the facts are concerned, they are conclusively settled upon this appeal by the plaintiff.

It appears that, in 1902 and theretofore, there had been a controversy over the boundary line between the counties of Franklin and St. Lawrence on the north and the counties of Lewis, Herkimer, Hamilton and Essex on the south. Chapter 473 of the Laws of 1902 was passed by the legislature as an act providing for the establishment of this line. Thereunder, the state engineer, with his assistants, undertook the work, directed to be performed by the act, and prosecuted it in good faith. The state engineer directed that the making of the survey and the marking of the boundaries required by the statute should be according to the straight base line method of survey; which was the one best adapted to the proper performance of the work, in securing the most certain and permanent results. What other methods of doing such work may have been practiced were found to be inferior. In prosecuting the survey, the assistants of the state engineer climbed the fence, surrounding the plaintiff's park, and cleared a "slash," or cutting, through the standing timber in his woods, which was, from first to last, some three and a quarter miles in length, varied from twenty-five to thirty-five feet in width for a quarter of a mile and, for the rest of the distance, from three to six feet, and involved the cutting down of some fourteen hundred trees. The surface thus cleared amounted to about one and eighty-six one-hundredths acres. It was, further, found with respect to the performance of the work that this cutting, while not upon the boundary line, "served as a base line from which to locate the boundary line

N. Y. Rep.]

Statement of case.

which was to be marked and was made for a purpose, in its nature temporary and incidental to the location and marking, prescribed by the statute." When making the survey, according to the straight base line system, except as to the cut timber being left upon the ground, the work was done with care and skill; the cutting, or "scar," was remote from the plaintiff's buildings and roads and it was only noticeable from points in a line with it, or within a few hundred feet of it. The merchantable value of the wood cut from the "slash" was about one hundred dollars less than the cost of removing it and the impairment in value of the plaintiff's preserve, as an entirety, amounted to five hundred dollars.

According to the judgment of the referee, the plaintiff failed to make a case for relief, either upon the ground that the defendants were exercising a discretionary power, not reviewable by the courts; or, if the power was reviewable, upon the ground that it appeared to have been the best and only method of survey. He thought, too, that any taking of property of the plaintiff was under the exercise of the police power of the state.

The Appellate Division, however, differed from the referee, in opinion, with respect to the theory upon which the acts of the defendants were justifiable, and that court entertained the view that, whatever was done, or taken, by the defendants, it was under the right of eminent domain. While the exercise of that power was subject to the statutory limitation that just compensation must be made, the Appellate Division held that the Court of Claims was open to the plaintiff as a court with competent jurisdiction to pass upon his claim for compensation.

William G. Wilson for appellant. The police power, properly so called, is limited to the control, for the public good, of the conduct of individuals and the use of their property. (*Munn v. Illinois*, 94 U. S. 113; *Thorpe v. B. & B. R. R. Co.*, 27 Vt. 143; *Reagan v. F. L. & T. Co.*,

154 U. S. 362; *U. S. v. Lynch*, 188 U. S. 445.) The exercise of the right of eminent domain must be attended by a sure and adequate provision for compensation. (*Sage v. City of Brooklyn*, 89 N. Y. 189; *Matter of Mayor, etc.*, 99 N. Y. 569; *People v. Hayden*, 6 Hill, 359; *C. R. R. Co. v. Comrs.*, 127 Mass. 50; *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9; *Traction Co. v. M. Co.*, 196 U. S. 239.) Injury to, or destruction of, property is a taking within the meaning of the constitutional provisions. (*Wynehamer v. People*, 13 N. Y. 378; *People v. Otis*, 90 N. Y. 48; *Forster v. Scott*, 136 N. Y. 577; *Pumpelly v. G. B. Co.*, 13 Wall. 166.) Chapter 473 of the Laws of 1902 was not effectual as an exercise of the right of eminent domain, nor was it intended as such. (*Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10; *W. U. T. Co. v. P. R. R. Co.*, 195 U. S. 540; *Sipple v. State*, 99 N. Y. 284; *Woodman v. State*, 127 N. Y. 397; *Mayor, etc., v. Furze*, 3 Hill, 612.) The defendants are personally liable. (*Adsit v. Brady*, 4 Hill, 630; *Robinson v. Chamberlain*, 34 N. Y. 389; *People v. Canal Board*, 55 N. Y. 390; *St. Peter v. Denison*, 58 N. Y. 416; *Matter of Ayres*, 123 U. S. 443.)

Julius M. Mayer, Attorney-General (*James G. Graham* of counsel), for respondents. The legislature had full power and authority to fix the boundaries, and by survey to determine the location thereof on the ground in order to establish the proper county lines in the disputed territory. (*People ex rel. Williams v. Dayton*, 55 N. Y. 378; *People ex rel. Joyce v. Brundage*, 78 N. Y. 403.) Injury to private property incidental to the valid exercise of the police power of the state affords no cause of action. (Cooley on Const. Lim. [7th ed.] 813, 829; *Watertown v. Mayo*, 109 Mass. 315; *Winslow v. Gifford*, 6 Cush. 327; *Green v. New York*, 2 Hill. 203; *Folcomb's Case*, 5 Coke, 116; *Beatty v. Perkins*, 6 Wend. 382; *Bell v. Clapp*, 10 Johns. 263; *Winslow v. Gifford*, 6 Cush. 327; *Orr v. Quimby*, 54 N. H. 590; *L. I.*

N. Y. Rep.] Opinion of the Court, per WERNER, J.

Co. v. Seymour, 35 N. J. 53; *Edwards v. Law*, 63 App. Div. 451.) The temporary occupation of appellant's land and the acts committed thereon were in the exercise of the right of eminent domain. (*People v. A. R. R. Co.*, 160 N. Y. 236.) The defendants in locating, establishing and permanently marking upon the ground said boundary lines were acting under the protection of legislative authority. (L. 1902, ch. 473; *Garratt v. Trustees*, 135 N. Y. 436; *People ex rel. Huntington v. Crenan*, 141 N. Y. 239; *People ex rel. Hall v. Bd. of Suprs.*, 30 Abb. [N. C.] 421.) The acts of the defendants were authorized, ratified and confirmed by the state, and liability for damages, if any, occasioned thereby, assumed by it. (L. 1902, ch. 473; L. 1903, ch. 348.) The legislature having authorized, ratified and confirmed the acts of the defendants and having provided compensation for property taken or damage done, or a means of securing the same at the time the decision was rendered, the judgment should be affirmed. (Cooley on Const. Lim. [7th ed.] 543; *Matter of Davis*, 149 N. Y. 539; *People v. Turner*, 117 N. Y. 227; *Turner v. New York*, 168 U. S. 90.)

WERNER, J. The plaintiff is the owner of about 9,000 acres of forest land in the Adirondack mountains. This tract he inclosed and improved as a park and game preserve, which was brought within the protection of the law by the posting of proper notices. In 1902 the defendants entered upon these premises and denuded of its growth of forest trees a strip of about $3\frac{1}{4}$ miles in length and from 3 to 8 feet wide, except for a distance of 1,350 feet where the cutting was from 25 to 35 feet in width. Upon a complaint which alleged these facts and contained averments of further threatened devastation of plaintiff's preserve by the defendants, the court granted a preliminary injunction restraining *pendente lite* the further commission of similar acts. There was no conflict of evidence as to the principal facts; the real defense being, that in the commission of the alleged trespasses the defendants were agents of the state engaged in the making of a survey under

legislative authority, and that nothing had been done upon the plaintiff's land that was not essential to the proper performance of the work. At the trial the learned referee gave judgment for the defendants, holding that in the commission of the acts complained of the defendants were agents of the state, which, in the exercise of its police power, had done nothing to invite or justify judicial interference with its agents. At the Appellate Division this judgment was unanimously affirmed, not upon that ground, but because the legislative enactment, under which the defendants sought to justify their procedure, contained inherent but obscure indications of the state's purpose to exercise the right of eminent domain, under which the only remedy open to the plaintiff is a resort to the Court of Claims for such damages as he may have suffered. On the present appeal it is sought to sustain the decisions below by discarding both of these divergent theories and justifying the action of the defendants under the state's general governmental power to establish boundary lines between its political subdivisions. In view of this diversity of opinion I venture to join the symposium of judicial disagreement with a fourth proposition under which I shall endeavor to demonstrate the error of the three preceding conclusions and to establish the plaintiff's right to maintain the action at bar.

To this end I invite attention to the initial fact that the dispute as to the boundary lines between the counties of Franklin, Hamilton, St. Lawrence and Essex, which is the underlying cause of this controversy, had existed for over a hundred years prior to 1902, so that there was no occasion for emergent action on the part of the state. A controversy of such long standing, even though it involved the jurisdiction of courts, the right of the franchise and the power of taxation, presented no exigency that required the immediate and arbitrary exercise of the police power or the law of overwhelming necessity in the invasion of private rights. (*Am. Print. Works v. Lawrence*, 23 N. J. Law, 590; *Matter of Jacobs*, 98 N. Y. 108; *Wynehamer v. People*, 13 N. Y. 401.)

It is to be observed, moreover, that the police power, which is concededly an inherent attribute of sovereignty, should be permitted to override or nullify our constitutional limitations only in cases of the highest public necessity. That governmental power, like every other, is subject to the Constitution, and when it is paramount it is because it is not limited by the Constitution, or because some immediate and overruling emergency calls for the application of the maxim *salus populi suprema lex*. If the trespasses complained of by the plaintiff were merely those of agents of the state, committed while necessarily engaged in the making of a survey to establish the boundary lines of civil divisions thereof, and which involved no such taking of private property for public use as to bring the plaintiff within the protection of the constitutional provisions embracing that subject, then it is obvious that there was neither occasion nor right for the exercise of the police power, since the inherent governmental power of the state, unrestricted by the Constitution, was ample for that purpose; and that assumption would, of course, necessarily compel the concession that the plaintiff's loss would be *damnum absque injuria*. It seems equally clear, however, that if the acts of the defendants went so far beyond the necessary incidents of a governmental survey as to involve the taking of plaintiff's private property for an alleged public use, the state is liable if the taking is authorized by its legislative direction, and the trespassers are liable if there is no such authority. This brings us logically to the discussion of the power of eminent domain, and to the assertion that it was exercised against the plaintiff under the statute invoked by the defendants.

The learned Appellate Division, although placing its decision upon the ground that the defendants' invasion of the plaintiff's land could be justified under the state's power of eminent domain, conceded "that much, of necessity, must be read into the statute authorizing condemnation," but concluded that "in one form or another, if the State through its officers has caused injury to the plaintiff in the prosecution of

a public work commanded by its legislature, * * * the Court of Claims must be open to him to prove and recover his damage." I think this position is utterly untenable. It is the settled law of this state that an injury to private property cannot be justified by the plea of a statutory sanction unless the latter is expressly given, or may be so clearly implied from the powers expressly conferred that the doing of the act which occasioned the injury can fairly be said to be within the legislative contemplation. (*Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10, 21.) Even under the most liberal reading of the statute now under consideration (L. 1902, ch. 473) it is impossible to find in it a single word or sentence indicating that the state proposed to exercise its right of eminent domain, or to make compensation for private property taken or destroyed. The legislative direction to the state engineer and surveyor was to "locate, establish and permanently mark upon the ground" the boundary line in dispute, and the sum of forty thousand dollars was appropriated, not to pay for property taken or to liquidate damage inflicted upon property owners, but for the purpose of the act; that is, to pay the necessary expenses of the survey. This is made clear beyond a doubt by a subsequent section of the statute limiting the amount which the state treasurer was authorized to pay on account of the work during the years 1902 and 1903, and providing for the final expenditure in 1904 "of twelve thousand dollars, or so much thereof as may be necessary for the completion of the work." Such a statute, if intended to authorize the exercise of the right of eminent domain, would be clearly unconstitutional, because it makes no provision for compensation to those whose private property is to be taken for a public use. While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover. (*Sweet v. Rechel*, 159 U. S. 380, 398; *Sage v. City of Brooklyn*, 89 N. Y. 189, 195; *Matter of Mayor, etc.*,

N. Y. Rep.] Opinion of the Court, per WERNER, J.

of *N. Y.*, 99 N. Y. 569, 577; *Brewster v. Rogers Co.*, 169 N. Y. 73, 80.)

It seems equally clear, also, that if the statute did not direct, and was not intended to authorize the exercise of the power of eminent domain, the defendants can claim no protection under it, and the immunity from liability for which they contend must be sought in some other direction. For this purpose we are referred to the statute of 1903 (Chap. 348), which enacts that, "For the purpose of making the surveys and performing the work provided for by this act, to the extent deemed necessary by the state engineer for such purpose, stating the purpose and extent thereof, the state engineer and surveyor, and upon his written authority, his assistants, agents, employees and servants, are hereby authorized and empowered to enter in and upon any and all lands in this state to whomsoever belonging and to do and perform any acts or act whatsoever necessary to do and fully complete such work and surveys, subject to liability only for payment of all damages on account of entry upon such lands and acts done thereon." This statute, if read literally and according to strict grammatical criticism, authorizes the state engineer and his assistants to do certain things, subject to individual liability for damages inflicted by their entry upon any lands. The defendants, and not the state, are to be liable for such damages. But that is a mere technicality, which, in the consideration of fundamental principles, may be passed without further mention.

When we undertake to find in the statute a legislative purpose to subject the state to liability for damages inflicted upon the private owner in the performance of this public work, we perceive more clearly the real and substantial objections to its use by the defendants as a shield against their wrongful acts. It was enacted in 1903, or something like a year after the commission of the alleged trespasses. To the extent that it may have been designed as a statute authorizing the taking or invasion of private property for the public use, it fails of its purpose, so far as the plaintiff is concerned, because his prop-

erty had been invaded before its passage. There is nothing retroactive in its letter, and it could not be retroactive in effect, for, as we have seen, it is one of the cardinal essentials of a statute authorizing the taking of private property for public use that provision for compensation must precede the taking or entry. The theory of respondent's counsel that the statute of 1903 operated to ratify and confirm the acts of the defendants upon the plaintiff's lands is untenable for two reasons: 1. If the statute of 1902 was effective to authorize the taking of or entry upon the plaintiff's lands, there was no need of ratification or confirmation, and in that view the so-called confirmatory statute of 1903 would be just so much waste paper. 2. If the statute of 1902 did not authorize the entry upon or taking of plaintiff's lands under the state's power of eminent domain the defendants were naked trespassers just in so far as they transcended, if they did transcend, the general governmental powers which inhere in the state's right to make surveys and delimit the boundaries of its civil divisions, and in that aspect of the case the unauthorized acts committed by the defendants upon the plaintiff's lands were wrongful and could be ratified by no one but the plaintiff. The statute of 1903, instead of being an attempted governmental ratification of the acts of a state agency, seems to be nothing more than a legislative admission of the insufficiency of the statute of 1902 to authorize such acts as were committed by the defendants upon the lands of the plaintiff.

Thus we are brought to the consideration of the two real questions upon which the fate of this litigation depends: 1. Whether the defendants' invasion of the plaintiff's premises was within the general and inherent power of the state in making a survey for the establishment of the disputed boundary lines of the counties named. 2. Whether the plaintiff's remedy, if the defendants' acts were in excess of such governmental power, lies in the Court of Claims in an action against the state, or in a court of general equity jurisdiction in a suit against the actual wrongdoers.

The power of the state to make surveys for public improve-

N. Y. Rep.] Opinion of the Court, per WERNER, J.

ments and to mark the boundaries of its civil divisions is so universally recognized that it may be conceded without discussion. In the case at bar we are not so much concerned about its existence as with its limitations. The existence of the power necessarily implies the right to make it practical and effective. For that purpose the state through its agents may, doubtless, enter upon and temporarily occupy private lands, or even commit acts thereon that are ordinarily classified as technical trespasses, without becoming liable to compensate the injured owner. It must be, however, that this arbitrary power has its limitations, and while these are no more clearly definable than the power itself, they are to be looked for in the special circumstances of each separate case. The statement of a few generalizations taken from learned authors cited by the respondents will serve to mark the angle from which the question should be viewed in the case at bar. "In the construction of public improvements, as railroads or canals for instance, before it is known that the land will be wanted, preliminary steps, such for instance as surveys, are indispensably necessary. These preliminary steps are in themselves a trespass, and may sometimes, as by felling trees, work actual injury to the proprietor. On the other hand, if payment be not made before the work is actually begun, then, if it be discontinued or left in imperfect state, the owner might be entirely remediless. In such a conflict of interests the current of decisions seems to tend to establish the rule that the preliminary steps in regard to public works may be taken without any compensation, but that before any definite act be done toward the construction of the improvement, which is in the nature of the assertion of ownership, payment must be made or tendered, or a certain and adequate remedy be provided, and unless this is done in the act authorizing the work, the statute is wholly unconstitutional and void, and any step taken under it is an unauthorized trespass." (Sedgwick on Construction of Stat. & Const. Law, pp. 467, 468.) "It is settled that the legislature may authorize railway companies to enter upon land for the purpose of preliminary surveys with-

out making any compensation therefor, doing as little damage as possible, and selecting such seasons of the year as will do least damage to the growing crops." (Redfield on Railways [5th ed.], p. 258.) "When a surveyor or engineer is an officer of the state or of the Federal government, or is acting by authority of either, or under powers granted to a corporation by the legislature, he is authorized to enter upon lands and perform his work, and cannot be interfered with, if acting within the scope of his duties. The entry must be for a temporary purpose and be accompanied with no unnecessary damages. Preliminary surveys may be authorized by the state without compensation being previously paid or secured by an owner. This is so even though the Constitution requires the payment of compensation to precede a taking, on the ground that no estate is thereby taken." (Wait on Law of Operations Preliminary to Construction and Engineering, sec. 353.) "No constitutional principle is violated by a statute which allows private property to be entered upon and temporarily occupied for the purposes of survey and other incipient proceedings with a view of judging and determining whether the public needs require the appropriation or not, and if so what the proper location shall be; and the party acting under this statutory authority would neither be bound to make compensation for the temporary possession, nor be liable to an action of trespass. When, however, the land has been viewed, and a determination arrived at to appropriate it, the question of compensation is to be considered." (Cooley's Const. Lim. [7th ed.] p. 813.) These extracts from the writings of learned commentators upon subjects germane to the question under consideration, clearly indicate that in the prosecution of public works by or under the authority of the state, except under the right of eminent domain or common-law necessity, there is immunity from liability for entry upon private lands, only to the extent that the entry or occupation is temporary, or the infliction of damage is incidental and incipient or preliminary. If the occupation is to be permanent or the damage is to be substantial, then the state and

those assuming to act under it must invoke those powers under which such things may lawfully be done. The case at bar differs in circumstance, but not in principle, from the illustrations taken from the learned authors above referred to. Here the permanent demarkation of boundary lines between several counties was the permanent work to be done. To that end a preliminary survey was necessary, and that could not be made without entry upon some private lands. It is reasonable to suppose that, to some extent, the blazing of trees, or the felling of an occasional tree, might be regarded as indispensable, and that the ordinary monuments of the surveyor's profession might have to be established on private lands. All this, and perhaps more, may fairly be considered as comprehended in the legislative direction "to locate, establish and permanently mark upon the ground" the disputed boundary lines. In the case at bar the defendants did not stop at these temporary, preliminary, incipient and incidental things which, as we have seen, may be done without making compensation or incurring liability, but they proceeded to practically appropriate a strip of plaintiff's land, three and one-half miles in length and from five to twenty-five feet in width, not temporarily, but for the purpose of permanently establishing a base line, from which the boundary line could be the more readily and permanently located. This base line consisted of a "slash" in the woods covering the whole of the territory above mentioned, that it will take eighty years of timber growth to repair. And this was done, not as a necessary and essential part of the survey, or upon the line thereof, but wholly upon the plaintiff's land, and purely because, in the judgment of the state engineer, such a "slash" would make a more permanent auxiliary or sighting line to the true boundary than any other method that could have been employed. We must assume, for the referee has found, that the method employed was "the one best adapted to the proper performance of the work prescribed," and was designed to secure the most certain and permanent results. For the purposes of illustration let us suppose that the most approved and up-to-date method of survey-

ing for boundary lines required the building of a stone wall on private property from 5 to 35 feet in width for a length of $3\frac{1}{4}$ miles; or that such a structure, or a "slash" like the one described in the record should occupy all the land of a private owner; or that the owner's residence, which happened to be where the base line was desired to be established, was razed to the ground and the materials scattered over the ground. Would any such entry and occupation by the agents of the state be justifiable under the state's inherent power to survey and mark boundary lines? I think not. And if not, then how can the acts herein complained of be justified? The difference between the illustrations and the fact is one of degree and not of kind. It is to be emphasized again, moreover, that the "slash" cut upon plaintiff's premises was not designed to mark the boundary line or to establish a permanent monument upon it, but to maintain an independent base line for convenient future reference. This was not, in my judgment, such an establishment and permanent marking of the boundary line upon the ground as was contemplated by the statute.

We deem it unnecessary to discuss at length the proposition that such an entry and occupation as is conceded to have been made upon the plaintiff's land is a taking of property within the meaning of our State and Federal Constitutions. "Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provisions." (*People ex rel. Manh. S. Instn. v. Otis*, 90 N. Y. 48-52.) "When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power." (*Wynehamer v. People*, 13 N. Y. 378.) "Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or com-

N. Y. Rep.] Opinion of the Court, per WERNER, J.

pensation, it deprives him of his property within the meaning of the Constitution." (*Forster v. Scott*, 136 N. Y. 577.) "It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrained from the absolute conversion of real property to the uses of the public, it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for public use." (*Pumpelly v. Green Bay Co.*, 13 Wall. 166.)

From the foregoing authorities and observations I summarize the following conclusions: That the state had no authority to do the acts complained of by the plaintiff. It did not assume to act under its power of eminent domain, or if it did, the attempted exercise of that power was unconstitutional because the statute relied upon to authorize it made no provision for compensation for the taking of private property. The supplementary statute, which, by a stretch of language, may be construed as authorizing such compensation, is unavailing because it was not passed until after the commission of the acts described, and it is fundamental that, although payment need not precede the taking, the provision for compensation is an indispensable precedent. Since the state cannot justify the invasion of the plaintiff's property for the purposes described under its police power, or the common-law right of necessity, or the inherent power to make surveys of its civil divisions, it follows that the acts of the defendants committed in excess of the last-mentioned power were unauthorized trespasses, for which the plaintiff is entitled to some relief, and for which some one is liable.

What is the plaintiff's remedy? It is argued by the learned attorney-general that the statute passed in 1904, and conferring upon the Court of Claims jurisdiction "to hear, audit and determine claims for damages caused by the state engineer and surveyor, and his assistants acting under his direction," in making the surveys authorized by the statute of 1902, clearly relegates the plaintiff to the Court of Claims as the only forum in which he may present his claim, and as clearly deprives him of any other remedy either against the state or against the defendants. The difficulty with this argument is to be found in a subsequent portion of the statute of 1904, not quoted by respondents' counsel. The concluding paragraph of that statute is: "Nothing in this act contained shall be construed as creating or acknowledging any liability on the part of the state." Thus falls the contention that either by the exercise of the right of eminent domain, or by *ex post facto* ratification, the state has assumed and recognized its obligation to pay the plaintiff his damages. The act of 1904 did not create a claim in favor of the plaintiff against the state, any more than section 264 of the Code of Civil Procedure, defining the general jurisdiction of the Court of Claims, undertakes to create claims against the state. In the statute of 1904 the question of the state's liability is distinctly left open.

Since the state cannot be held liable upon any of the theories already discussed, it remains to be ascertained whether it is generally liable for the torts of its officers or agents, or only in special instances expressly created by law. The general rule, as I understand it, is very clearly and forcibly stated in *Poindexter v. Greenhow* (114 U. S. 270, 290) in the following language: "The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that it is a lawless usurpation. * * * It is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government and not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is

N. Y. Rep.] Opinion of the Court, per WERNER, J.

unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name." No language could more aptly depict the situation disclosed by this record. The state, through its Constitution, has ordained that no man's property shall be taken without due process of law and just compensation. The state engineer, assuming to act for the state, and doubtless believing himself authorized to act for it, has taken and destroyed plaintiff's property without such process or compensation. This being contrary to law, it cannot be the act of the state, and, therefore, must be "the mere wrong and trespass of those individuals" who mistakenly spoke and acted in its name.

The cases which are sometimes referred to as exceptions to this general rule are not exceptions at all, for they do not fall within the rule. When a state, by express enactment of statutes, assumes responsibility for such torts of its officers and agents as are not affected or controlled by the fundamental law, it makes a new rule for itself. Instances of that kind are to be found in *Sipple v. State of N. Y.* (99 N. Y. 284), where the legislature enacted a statute making the state liable for the negligent operation of its canal locks, upon proof that would create a legal liability against an individual or a private corporation, and in *Woodman v. State of N. Y.* (127 N. Y. 397), where negligence in the maintenance of a defective canal bridge was attributed to the state under a similar statute. There are still other classes of cases in which the state has been held liable for the apparent torts of its agents, but in reality for its own neglect of duties assumed under mandatory or permissive statutes, as in *Ballou v. State of N. Y.* (111 N. Y. 500), where the state built a sewer which was permitted to overflow on the plaintiff's premises, and in *Mayor, etc. of N. Y. v. Furze* (3 Hill, 612) where the municipality, which had been empowered to build a sewer, was held liable for its neglect to properly maintain it.

Thus, by the process of exclusion, we come to the final

question whether the defendants can be held liable as individuals. If I have thus far reasoned correctly, such liability seems to follow as a logical necessity. The trespasses committed upon the plaintiff's land were not the acts of the state, but the unauthorized and unlawful wrongs of the defendants who, although the agents of the state within their sphere of duty, were naked usurpers in assuming to do that which the state could neither do nor authorize to be done, except in the exercise of its power of eminent domain; and that power, as we have seen, was either not attempted to be exercised at all, or if it was, the effort was fruitless because absolutely void. If this assumption is correct, it matters not whether the operations of the defendants upon the plaintiff's land were characterized by reasonable care or gross negligence. The fact that they were unauthorized is sufficient to confer upon the plaintiff a right of action against the defendants. (*St. Peter v. Denison*, 58 N. Y. 416.) The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. This principle was plainly stated in the opinion of the court in *Poindexter v. Greenhow* (*supra*), as follows: "The case then of the plaintiff below is reduced to this: He had paid the tax demanded of him by a lawful tender. The defendant had no authority of law thereafter to enforce other payment by seizing his property. *In doing so he ceased to be an officer of the law and became a private wrongdoer.* It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized, taken and detained the personal property of another." (*In re Ayers*, 123 U. S. 500, 501.) The principle thus clearly enunciated has been recognized in this state in *Adsit v. Brady* (4 Hill, 631), where a superintendent of repairs on a state canal was personally held liable for his failure to remove an obstruction to navigation, in consequence of which a canal boat was injured; and in *Robinson v. Chamberlain* (34 N. Y. 389), where a contractor, who had

N. Y. Rep.]

Dissenting opinion, per GRAY, J.

been invested with and assumed the powers of a state officer, neglected to properly maintain a lock gate within the area of his contract, causing damage to a boat and its furniture; and in *People v. Canal Board* (55 N. Y. 391), where the whole argument in the opinion is predicated upon the proposition "That public bodies and public officers may be restrained by injunction from proceeding in violation of law to the prejudice of the public, or to the injury of individual rights, cannot be questioned."

In the case at bar the complaint and the proofs establish a cause of action against individuals who have mistakenly and unlawfully assumed to act under color of law, so that in its simplest analysis the ultimate question is, whether the plaintiff could maintain this form of action against the defendants if they had professed to enter his premises simply as individuals. As that question can have but one answer, we conclude that the judgment of the courts below should be reversed and a new trial had, with costs to abide the event.

GRAY, J. (dissenting). The facts, which have been stated above, were drawn by the referee from abundant evidence. A great deal of the evidence in the record related to the way in which the work of survey was done, or ought to have been done. The evidence established, almost beyond reasonable cavil, that the method adopted, of creating a transit, or straight, line from point to point to serve as a base from which the markings and monuments are made, is the best. It appeared to be in use by the general government, in the work of establishing boundary lines between states and countries, and, also, by other state governments. At any rate, it is found as a fact, upon the evidence, to have been the way best adapted to the proper performance of the work prescribed by the act.

The evidence as to the result to the plaintiff's park of the acts of the defendants, in prosecuting their work of survey, while, undoubtedly, showing a cutting through the woods, or "scarring" them, as it is called, fails to carry a conviction that the material damage was of any importance. What dam-

age there was shown, in the felling of trees, was found to have been incidental to the work and necessary under the command of the act. It is clear that the park, as a preserve for animals, or a pleasure to the eye, was not sensibly, or permanently, affected by the defendants' acts. However, the findings of the referee are sufficient upon that subject.

There is no question, here, of the exercise of the police power of the state; nor is there of that of the right of eminent domain. There is, simply, a question of the necessary exercise of governmental powers in delimiting and in establishing boundary lines between political subdivisions of the state; the acts incidental to which, if not open to the charge of negligence, or of unskillfulness, would constitute *damnum absque injuria*. There was no exercise of the police power; for that is predicated upon the necessity of some legislative regulation, having for its object the comfort, safety, health, or welfare, of the citizens. Nor was there an emergency, or some overwhelming necessity, which demanded, and justified, the summary dealing, or interference, with private rights of property. (*Matter of Jacobs*, 98 N. Y. 98, 108.) There was no exercise of the right of eminent domain; because the act, in directing the public work, neither contained any language appropriate to the taking, or condemnation, of private property, nor disclosed an intent that any private property should be taken for the public use. Unless we find, therefore, some authorization in the act to appropriate private property, as, for instance, by its destruction during the prosecution of the work, the right of eminent domain was not exercised. That is something, which is dormant in the state, until legislative action is had, pointing out the occasions, or the modes, or the conditions for the appropriation. (Cooley's Const. Lim. *528.)

Turning to the act, which was passed in 1902 (L. of 1902, chap. 473), we find, in its first section, that it authorizes and directs the state engineer and surveyor "to locate, establish and permanently mark upon the ground" the boundary lines of certain counties mentioned; to file in his office a report of the work done, with a map showing the location,

N. Y. Rep.]

Dissenting opinion, per GRAY, J.

establishment and permanent marking of the boundary line upon the ground, and to file copies of the map in certain state and county clerks' offices. The rest of the section, merely, provides for the extent to which maps shall be evidence of the location of the boundary lines. The second section appropriates the sum of forty thousand dollars for the purposes of the act, and the third section provides the manner in which the moneys appropriated shall be paid out. It is plain enough from the act that nothing is directed, or contemplated, other than a purely governmental location and establishment of county boundary lines, with marks to make them permanent. What the defendants did was under the authorization of this act and, as it has been before said, their work was carefully and skillfully done; it was done according to the best, if not by the only permanent, method, and there is no charge, nor pretense, of malice. The damage, if it may not be considered as relatively trivial, was consequential and, in such a case, public officers employed in doing the work would not come under liability. (*Radcliff's Executors v. Mayor, etc., of Brooklyn*, 4 N. Y. 195, 205, 206; *Atwater v. Trustees of Canandaigua*, 124 ib. 602; Cooley's Const. Lim. *542.) It would furnish no ground for arresting the work, upon which the legislature had determined in the interest of the state government. (*Waterloo W. Mfg. Co. v. Shanahan*, 128 N. Y. 345, 362.) In *Atwater v. Trustees of Canandaigua* (*supra*), the damage claimed was charged to have been caused by the construction of a temporary dam, made necessary in the course of a certain public improvement authorized by law, and it was held, because a temporary structure essential to the making of the public improvements, that no cause of action accrued to the plaintiff. It was observed by Judge BRADLEY, in his opinion, that "serious injury to property may be occasioned by the lawful exercise of powers of a public character pursuant to law, and, if the work is carefully and skillfully performed, the consequences may be *damnum absque injuria*, when the legislature has provided for no compensation." In this case, what was necessarily done by the

state engineer upon the land of the plaintiff, in order to perform the requirements of the legislative act, was not an appropriation, or taking, of private property, otherwise than in the felling of trees in order to make the straight, or transit, line for the location and permanent marking of the boundary line. The result was of a temporary nature and effected no permanent appropriation of property. It is, doubtless, true, where a legislative act intends to exercise the sovereign power in depriving an individual of his property, that it should provide for compensation to be made; (*Sage v. City of Brooklyn*, 89 N. Y. 189; *Matter of Mayor, etc., of N. Y.*, 99 ib. 569, 577), but the act in question had no such intent. It contained no provision for compensation for an appropriation; nor was the state required, in the enactment of the law, to make provision for compensation, when its power was not to be exercised in the appropriation of private property. If, in the execution of the work, it might happen, as it happened in this case, that incidental, or temporary, damage should be occasioned to private property, that would not characterize what was done under the act as an exercise of the right of eminent domain. It has been held that no constitutional principle is violated by a statute, which allows private property to be entered upon, and temporarily occupied, for the purpose of survey and other incipient proceedings, with a view to judging and determining whether the public needs require the appropriation and what the proper location shall be. A party in such a case would be bound, neither to make compensation for the temporary possession, nor would he be liable as for a trespass. (See *Cooley's Const. Lim.* *560; *Sedgwick's Stat. & Const. Law* 467, and cases cited.)

While, therefore, it does not appear how the defendants, as officers of the state executing a purely governmental duty in a proper manner, can be restrained by injunction, or can come under any liability to the plaintiff; nevertheless, if he had a claim against the state, by reason of damage occasioned to his property, he was not without a remedy, to be enforced by suit in the Court of Claims. In the first place, by an act passed in

the following year, 1903, (L. of 1903, chap. 348), amending the act of 1902, the legislature conferred power upon the state engineer and his assistants to enter upon all lands in the state and to perform any acts necessary to complete their work, "subject to liability only for payment of all damages on account of entry upon such lands and acts done thereon." This amendment operated to ratify the acts of the defendants and assumed liability for any damages occasioned. In the second place, in 1904, (L. of 1904, chap. 561), the legislature conferred jurisdiction upon the Court of Claims "to hear, audit and determine the claims for damages caused by the state engineer and surveyor, and his assistants, acting under his direction," etc.

The conclusions reached, therefore, are that this action cannot be maintained, to restrain the defendants from performing the duty devolved upon them by the act, when performed in the manner described in this case, and the authority of the act was not impaired by the absence of any provision for compensation. If the plaintiff has any claim against the state, for what damage may have been occasioned to his property, under the acts of 1903 and 1904, above mentioned, a tribunal was open to him wherein to prosecute his remedy upon that head.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT and HISCOCK, JJ., concur with WERNER, J.; GRAY, J., reads dissenting opinion; O'BRIEN, J., absent; CHASE, J., not sitting.

Judgment reversed, etc.

ST. REGIS PAPER COMPANY, Appellant, v. THE SANTA CLARA LUMBER COMPANY, Respondent, Impleaded with Another.

CONTRACT—WHEN CONTRACT MAY BE ENFORCED BY ACTION FOR SPECIFIC PERFORMANCE AFTER ATTEMPTED RESCISSION THEREOF. Where it is provided, in a contract for the sale and delivery of a designated quantity of pulp wood a year, for a certain period of years, at a specified price per cord, that the vender should commence to cut the wood at a specified time each year for the following season's supply, and that the vendee should make such advances to the vender as it might

request during the progress of the work, but not more than approximately the cost of the work done, the balance of the purchase price to be paid at a specified time after the delivery of the wood to the vendee, and the vendee, from time to time, at the demand of the vender, advanced various sums until they aggregated an amount which the vendee believed and claimed was sufficient to comply with the contract, but which the vender claimed was insufficient and notified the vendee that the contract would be rescinded unless requests for further advances were complied with more promptly; the vender cannot, without other and more definite notice, and while negotiations for an arbitration of the differences between them were pending, during which time it accepted further advances from the vendee, return the moneys advanced and rescind the contract; and the vendee, having refused to accept the advances returned by the vender, and having insisted that the contract must be fulfilled, may maintain an action in equity for the specific performance thereof.

St. Regis Paper Co. v. Santa Clara Lumber Co., 105 App. Div. 841, reversed.

(Argued June 15, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 16, 1905, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Elon R. Brown and *Henry Purcell* for appellant. The court below erred in its interpretation as to advances. (1 Jarman on Wills, 532.) The defendant could not rescind the contract at a time when it was itself in the wrong by demanding more money for advances than the cost of the work done. (*Wright v. Reusens*, 133 N. Y. 298; *Graf v. Self*, 109 N. Y. 369; *Ellis v. Hoskins*, 14 Johns. 363; *Hatten v. John*, 83 Penn. St. 219; *Webb v. Stone*, 24 N. H. 288; *Stewart v. Mary*, 7 Ill. App. 508; *Myers v. Gross*, 59 Ill. 436; *Burris v. Shrewsbury Park, etc., Co.*, 55 Mo. App. 381; *Grandy v. McCleese*, 2 Jones Law, 142; 64 Am. Dec. 574.) The trial court overlooked the bearing and force of the provision for arbitration on the construction of the contract and upon the relations of the parties during its performance. It was an effective covenant to prevent a complete loss of the contract

under circumstances like those disclosed in this action. (*D. C. Co. v. P. C. Co.*, 50 N. Y. 250; *Nat. Cont. Co. v. H. W. Co.*, 170 N. Y. 439; *Haggart v. Morgan*, 5 N. Y. 422; *Davenport v. L. I. Co.*, 10 Daly, 535; *Viney v. Bignold*, L. R. [20 Q. B. Div.] 172.) The doctrine of rescission of contracts by one party for failure of the other party to comply with a condition, has no application as a rule of law to this case. (*Cox v. Stokes*, 156 N. Y. 491; *Nichols v. S. S. Co.*, 137 N. Y. 471; Benj. on Sales [7th ed.], 578, § 593; *L. S. R. R. Co. v. Richards*, 30 L. R. A. 45; *Dubois v. D. & H. C. Co.*, 4 Wend. 285; *Norrington v. Wright*, 115 U. S. 188.) The question of the right of rescission under the facts of this case is one of equity and not of law, and a court of equity will not suffer the defendant to rescind. (*Painter v. Newby*, 11 Ha. 26; *Nelthorpe v. Holgate*, 1 Coll. 203; *Hoy v. Smythies*, 22 Beav. 510; *Webb v. Hughes*, L. R. [10 Eq.] 218; Fry on Spec. Perf. § 1416.) Whether the doctrine of rescission of contracts be considered from the point of view of law or equity there was a substantial performance, and trivialities are not available to destroy great interests. (*Woodward v. Fuller*, 80 N. Y. 312; *Van Clief v. Van Vechten*, 130 N. Y. 571; *Crouch v. Gutman*, 134 N. Y. 45; *Miller v. Benjamin*, 142 N. Y. 613; *Ringle v. Wallis Iron Works*, 149 N. Y. 439; *Spence v. Ham*, 163 N. Y. 220.)

George R. Malby and *Henry W. Jessup* for respondent. The defendant was justified in demanding these advances. (*Chase v. Ewing*, 51 Barb. 597; *Cooper v. Cooper*, L. R. [8 Ch. App.] 813; *L. P. Co. v. Buckhardt*, 97 U. S. 117; *Vail v. Vail*, 10 Barb. 69.) The lumber company was justified in rescinding the contract sought to be specifically enforced for the breach of the covenant to make "advances." (*Waterman v. Van Ewen*, 2 Abb. Pr. 364; *Payton v. Wight*, 2 Hilt. 77; *Watts v. Rogers*, 2 Abb. Pr. 261; *Mansfield v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 205; *Burling v. King*, 66 Barb. 633; *Lewis v. Andrews*, 127 N. Y. 673; *Mitchell v. Halheimer*, 56 Hun, 416; *Show v.*

L. T. R. Co., 3 P. & W. 445; *Preston v. Finney*, 2 W. & S. 53; *McCreary v. Green*, 38 Mich. 172.)

CULLEN, Ch. J. This action was brought for the specific performance of a contract whereby the defendant agreed to cut and deliver to the plaintiff from eleven to thirteen thousand cords of pulp wood a year from a large tract of wild lands in the Adirondacks owned by the defendants, during the term of ten years, at the price of nine dollars a cord, with the privilege to the plaintiff to obtain a renewal of the contract for an additional term of ten years at twelve dollars per cord. The case has been before this court on a previous appeal and is reported in 173 New York (p. 149). In that report will be found a statement of the parts of the contract material to this controversy. On the former appeal this court, reversing the decisions of the courts below, held that the contract was one the performance of which a court of equity could properly enforce. After our decision the case was tried on its merits and judgment was rendered by the trial court in favor of the defendant on the ground that the plaintiff had made default in the performance of that provision of the contract whereby the plaintiff agreed to make advances to the defendant for the cost of cutting and getting out the wood. The provision is as follows: "Party of the first part (defendant) shall commence to cut wood on or about the 15th day of August of each year for the following season's supply. Party of the second part (plaintiff) shall make such advances of money to party of the first part as it may request during the progress of the work, but party of the second part need not advance more than approximately the cost of the work done. Payment for the said wood shall be made by the party of the second part to the party of the first part on the 15th day of each month for the wood delivered during the next preceding calendar month, after first deducting from the aggregate of the purchase price of the said wood one-tenth of the advances made upon that season's operations until such advances have been repaid." The judgment of the Special Term was

affirmed by the Appellate Division by a divided court, and from the judgment of affirmance this appeal is taken.

The contract, dated the 29th day of August, 1899, was executed by the parties about the first of October in that year. For some time prior to the execution of the contract, however, the parties had been in negotiation concerning it, and during that interval, in contemplation of the contract, the defendant had built roads, constructed permanent camps and incurred expenses for various items necessary for the prosecution of the work. Under the contract the wood was to be delivered to the plaintiff at any point, the expense of the transportation to which should not exceed the cost of the transportation from Tupper Lake Junction to Watertown, New York, and the delivery was to commence on or about the first day of June in each year. The ordinary method of taking out wood was to cut it and haul it to the streams during the winter season, whence the next spring it was floated to the point of delivery. No deliveries would be, therefore, made to the plaintiff till June, 1900. On October 7th the defendant demanded the sum of \$2,500 on account of expenses already incurred by it, with which demand the plaintiff complied on October 18th. On October 26th the defendant demanded the sum of \$5,000 on account and on November 17th an additional sum of \$5,000. On account of these two demands the plaintiff, on December 5th, paid the sum of \$7,500. Now, while the whole controversy and the decision of the court below proceed on the failure of the plaintiff to properly respond to the defendant's demands for advances, it would be impracticable to give within the limits of an opinion even an abstract of the details of the correspondence between the parties. It is sufficient to say that from October 26th, 1899, to March 24th following, the defendant made repeated demands for advances while the plaintiff insisted that the advances asked for by the defendant were largely in excess of those ordinarily made for the purpose of taking pulp wood from the forest. On March 24th, 1900, which was the date of the last demand by the defendant prior

to its notification to the plaintiff that the contract was rescinded by it, the account between the parties, as found by the trial court, stood as follows: The defendant had expended \$37,132.80, the plaintiff had advanced the defendant the sum of \$25,000. On March 24th the defendant sent to the plaintiff the following letter:

“MALONE, N. Y., *March 24th*, 1900.

“THE ST. REGIS PAPER CO., Watertown, N. Y.:

“DEAR SIRs.—In response to my notice to you some time since you sent me check for \$5,000 on the Santa Clara Lumber Co. pulp-wood contract, which I at once forwarded to the company in New York. I have to-day received a letter from the company, saying that they have received \$25,000, which was \$12,500 short of the actual cost of the wood in its present condition, and they request me to ask you to remit at least \$5,000 more; that the annoyance that they experience in getting these advances is so great that they feel very much disinclined to continue trying to fulfill the contract on their part unless the advances can be more promptly made. Hoping that you will remit at least \$5,000 I remain,

“Very respectfully yours,

“JOHN P. BADGER.”

To which the plaintiff made this reply:

“WATERTOWN, N. Y., *March 26*, 1900.

“JOHN P. BADGER, Esq., Malone, N. Y.:

“DEAR SIR.—Your favor of the 24th inst. at hand and noted. We have advanced the Santa Clara Lumber Co. \$2 per cord upon the quantity of pulp wood which they claim to have cut, and we have advanced this amount promptly upon receiving their several requests. As we have already explained to you, this is the amount which is ordinarily advanced to cover the cost of pulp wood delivered to the stream. We understand that the Santa Clara Lumber Co. have spent an unusual amount of money this year in establishing permanent camps and roads with a view of reducing the expense of maintenance in the future. We also understand

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

that they have been lumbering upon their own account. We could hardly be expected to share in unusual expenses, and in view of the fact that they are conducting extensive operations of their own, it seems to us the only way we can arrive at the amount to advance is to take the customary amount. As we have heretofore said to you, however, the matter is merely one of interest, and we have suggested a friendly arbitration. You have consented to the arbitration, but, nevertheless, continue to make further requests for additional advances.

“Very truly yours,

“G. C. SHERMAN, *Treas.*”

Nothing further passed till April 12th, when the defendant notified the plaintiff that on account of the latter's failure to make advances to the extent of the cost of work done the contract was rescinded, and at the same time sent to the plaintiff a certified check for \$25,344.79, the amount advanced by it with interest. It appears that at this time pulp wood had appreciated in price, and the defendant had made a contract for the sale of its wood to other parties on more favorable terms. The plaintiff refused to receive the check and wrote the defendant insisting that the contract still continued in force, and thereupon the plaintiff brought this action for its specific performance.

The learned trial court found that the plaintiff failed and refused to “advance the cost of the work as requested by the defendant or any fair approximation thereof. That the defendant repeatedly notified the plaintiff of its intention to rescind the contract in case its requests were not complied with. * * * That the plaintiff did not make the advances, as requested, for approximately the cost of the work done and that, with knowledge of the cost and of the terms of the contract and with notice of the intention of the defendant to rescind, if its requests were not complied with, deliberately and intentionally refused and neglected to make such advances, and that such refusal and neglect was not caused by any inadvertence or by any misunderstanding of the facts.” If the testimony in any aspect justified this finding of the trial court, it is a

complete answer to this appeal, for equity will not enforce a contract at the instance of a party who has deliberately and intentionally neglected and refused to comply with its requirements. But we think that there is no evidence to support this finding. Granting, as we must, for the trial court has so found, the fact that the advances made by the plaintiff did not equal the expenditure incurred approximately by the sum of \$12,500, that fact alone does not show that the plaintiff's default was deliberate and intentional. We agree with the learned counsel for the respondent that the advances, which under the contract the plaintiff was obliged to make, were not limited by the ordinary and customary advances made to parties who get out wood for the market, but only by the sum which the defendant actually and properly expended towards cutting and hauling the lumber. Nevertheless, the contract was one which would naturally breed dispute and difference of opinion, for no definite amount to be advanced was specified. Whether outlay made for the work of a permanent character, such as the construction of roads and the building of camps, the defendant was entitled to demand from the plaintiff, under the provisions of the contract, is not wholly free from doubt. While the fact that the amounts called for by the defendant largely exceeded the usual advances in the business did not justify the plaintiff in refusing to accede to the defendant's demands, still it tended to excuse plaintiff's hesitation in complying. The contract contained a provision that all matters of difference that might arise between the parties respecting the contract or the fulfillment thereof should be determined by arbitration. We concede that this provision was too broad to be enforced by the courts. Nevertheless, granting its invalidity, the parties negotiated for an arbitration under it. These negotiations had not been terminated at the time of the defendant's rescission of the contract. There is nothing to show that the position of the plaintiff in this controversy was not taken by it in good faith. It was willing to help the defendant obtain money, for it expressly offered to discount the defendant's note for such

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

amount as it might need. There is not a word from the plaintiff to be found in the correspondence tending to show an abandonment of the contract. On the contrary, it was constantly insisting on its performance. It is true that the plaintiff erred in its construction of the contract and as to its liability to make advances thereunder, and, therefore, that it had not strictly performed the contract on its part. But that did not necessarily debar it from relief. Of such a situation this court said by Judge DANFORTH, in *Day v. Hunt* (112 N. Y. 191): "These objections cannot prevail. On the contrary, the very fact that the plaintiff has not strictly performed his part, and so is without remedy at law, is frequently a sufficient reason for the interposition of courts of equity, where relief is given, notwithstanding the lapse of time according to the actual merits of the case. * * * There is nothing to show that either party abandoned the contract or wished or intended to do so. They differed merely as to the form of the mortgage, and, so far as appears, that difference only prevented the completion of the sale. Although wrong in his construction as to its proper force, the plaintiff cannot be said to be wholly without excuse."

There is this further and, to my mind, controlling factor in this case. There had been at least a part performance by the plaintiff and a substantial part, and courts of equity regard with more favor actions to enforce specific performance where there has been performance in part than where nothing has been done by either party under the contract. Thus Mr. Pomeroy writes (Eq. Jurisprudence, sec. 812) of the specific performance of contracts for the sale of land: "But in some cases time almost ceases to be material, as where the vendee has paid the purchase money, or is in possession of the land, it is then said that time does not run against him." While the trial court has found that the defendant notified the plaintiff of its intention to rescind the contract, unless its requests were complied with, it must be borne in mind that this notice was of the most general character, that is to say, that if advances were not more promptly made the defendant would be unable to fulfill and would give up the contract. Never-

theless, despite these notices, the defendant continued to take such moneys as the plaintiff advanced. Such receipt operated to abrogate any right to rescind that might then exist. The last payment so made by the plaintiff was the sum of \$5,000 on March 12th. The rule seems to be well settled that though a party to a contract is in default, if the other party continues to negotiate with him after such default the contract cannot be rescinded without reasonable notice to the party in default to comply with the contract within a specified time. (Pomeroy's Eq. Jurisprudence, sec. 815.) In *Webb v. Hughes* (L. R. [10 Eq.] 281) a contract for the sale of land was to be closed on February 26th. Negotiations were continued after the date set for closing, and on April 7th the purchaser gave notice of immediate abandonment. Specific performance was decreed, the vice chancellor saying: "But, having once gone on negotiating, beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown." In *Parkin v. Thorold* (16 Beavan, 59) notice was given on October 21st that the contract must be performed on November 5th or otherwise would be abandoned. Specific performance was decreed, the length of notice being held insufficient. The defendant's letter of March 24th, already recited in full, gave the plaintiff no notice that a certain amount must be paid by a certain time, but merely expressed the feeling of the defendant that it was "disinclined to continue trying to fulfill the contract on their part, unless the advances can be more promptly made." This was wholly insufficient as a notice of the defendant's election to abandon the contract unless by a certain time the plaintiff made the necessary advances. The defendant could not under the circumstances rescind the contract without notice. We are of opinion, therefore, that the judgments below were erroneous.

It is unfortunate that the case should have been so long in litigation that during its pendency over half the first contract term has expired. However, in case the plaintiff succeeds on a new trial the court may mold its decree in such form as,

N. Y. Rep.]

Statement of case.

in view of the lapse of time and its effect on the interest of the parties, equity may require.

The judgment appealed from should be reversed and a new trial granted, costs to abide the final award of costs.

EDWARD T. BARTLETT, VANN, WERNER and WILLARD BARTLETT, JJ., concur; GRAY, J., dissents; CHASE, J., not sitting. Judgment reversed, etc.

ROBERT G. MARCH, as Executor of and Trustee under the Will of PETER S. MARCH, Deceased, et al., Respondents, v. SETH S. MARCH et al., Appellants, and MARY M. M. KENNEDY et al., Respondents.

1. WILL — DEATH OF LEGATEE BEFORE PAYMENT OF LEGACY. A limitation over, to take effect in case of the death of a legatee before the conveyance and payment of the legacy, is effective if the legatee does not live to become entitled to it and to demand its payment or maintain an action therefor.

2. PRESUMPTION AS TO TESTATOR'S INTENTION. The presumption exists that a testator, in the absence of unfriendly relations between himself and his descendants, had the desire and intent that his property should go to his descendants rather than to strangers to his blood, and should be considered in the interpretation of his will.

8. LEGACY PASSES TO ISSUE OF DECEASED LEGATEE AND NOT TO HIS DEVISEES. A testamentary provision, "That in the event of the death of any of my children before the conveyance and payment to him of the share of my estate herein given to him; or of either of my children whose share of my estate is held in trust, that my Executors convey, pay and assign the share of the one so dying to his or her issue absolutely, and if he or she shall leave no issue, then that they convey, pay, assign and divide such share or the proceeds thereof to and among my surviving children and to the issue of any deceased child, such issue to take by representation the part or share his, her or their parents would have been entitled to, if living," is effective to vest in a grandchild that portion of the share of his father, who died after the testator, but before the executors, who, under the will, had discretionary power to sell the real estate, could, by the exercise of diligence and good faith, dispose of a portion of it situated in a foreign state and, therefore, were unable to pay over to the father his share of the proceeds of the sale.

March v. March, 104 App. Div. 680, affirmed.

(Argued May 2, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 26, 1905, which affirmed a judgment of Special Term construing the will of Peter S. March, deceased.

The facts, so far as material, are stated in the opinion.

William B. Hornblower for appellants. The phrase contained in the 4th clause of paragraph 5 of the will, "in the event of the death of any of my children before the conveyance and payment to him of the share of my estate herein given to him," is not to be construed as referring to the physical facts of conveyance and payment, but to the accruing of the right to conveyance and payment as theretofore provided by the 3d clause of paragraph 5. (*Underwood v. Curtis*, 127 N. Y. 523; *Watkins v. Reynolds*, 123 N. Y. 211; *Campbell v. Stokes*, 142 N. Y. 23; *O'Donoghue v. Boies*, 159 N. Y. 97; *Roseboom v. Roseboom*, 81 N. Y. 356; *Matter of Peters*, 69 App. Div. 465; *Freeman v. Coit*, 96 N. Y. 63; *Banzer v. Banzer*, 156 N. Y. 429; *Washbon v. Cope*, 144 N. Y. 287; *Byrnes v. Stilwell*, 103 N. Y. 453.)

Mornay Williams for defendants, respondents. The time of sale was left to the discretion of the executors, and that discretion cannot be interfered with. (*Haight v. Brisbin*, 96 N. Y. 132.) The discretion was absolute, and as the distribution, conveyance or payment of shares was not to be made until after a sale, the executors were entitled to delay the sale, and consequently the distribution, to such time as they saw fit. (*Hancock v. Meeker*, 95 N. Y. 528; *Elwin v. Elwin*, 8 Ves. 547.) Frank P. March having died before the time when the distribution could be made, or, in other words, before the time when the whole of the bequest to him was payable, the effect of the 4th subdivision of clause 5 was to defeat such bequest, as far as the same was not payable before his death, and to vest in his daughter the portion of the share not payable to her father. (*Johnson v. Crook*, L. R. [12 Ch.] 639; *Whitman v. Aitken*, L. R. [2 Eq.] 414;

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

Hutchins v. Mannington, 1 Ves. 366; *Martin v. Martin*, L. R. [2 Eq.] 404; *Matter of Chaston*, 50 L. J. [Ch.] 716.)

HAIGHT, J. This action was brought to obtain a construction of the last will and testament of Peter S. March, who died in the city of New York on the 11th day of February, 1899. The questions about which the parties differ arise under the fifth clause of the will, which provides as follows:

"*Fifth.* I give, devise and bequeath all the rest, residue and remainder of my estate and property, as well real as personal, of which I shall die seized, possessed or entitled and wheresoever situate, To my Executors and Trustees hereinafter named and to the survivors and survivor of them In Trust for the uses and purposes following:

"1. That my Executors and Trustees sell, convey and dispose of the same at public or private sale at such times and on such terms as they may think proper.

"2. That my Executors and Trustees invest and keep invested during the life of my wife one-third part of such residue of my estate, or the proceeds thereof, and pay or apply the rents, interest and income thereof to the use of my wife so long as she shall live.

"3. That my Executors and Trustees divide the remainder of such residue (and on the death of my wife the one-third part held for her benefit) into six equal parts or shares, and convey, pay and assign one of such shares to my son Edwin P. March, first deducting the said sum of fifteen thousand dollars as herein directed; that they convey, pay and assign one other of such shares to each of my sons, Frank P. March and Egbert G. March, absolutely; that my Executors and Trustees set aside and designate one of the remaining three shares for each of my daughters, Virginia A. March and Laura J. Adams, and son, Seth S. March, and hold, invest and keep invested the share of each child last named during his or her life, and collect and receive and pay or apply the rents, interest and income of the share of each child to the use of such child during his or her life, and upon the further trust,

"4. That in the event of the death of any of my children before the conveyance and payment to him of the share of my estate herein given to him; or of either of my children whose share of my estate is held in trust, that my Executors convey, pay and assign the share of the one so dying to his or her issue absolutely, and if he or she shall leave no issue, then that they convey, pay, assign and divide such share or the proceeds thereof to and among my surviving children and to the issue of any deceased child, such issue to take by representation the part or share his, her or their parents would have been entitled to, if living."

The testator's wife predeceased him. His son Frank P. March died on the 10th day of May, 1900, leaving him surviving a widow, from whom he had been separated in his lifetime, and a daughter, Mary McIlvaine March, now Kennedy, his only heir at law and next of kin, whom he disinherited by his last will and testament. The testator, Peter S. March, died possessed of both real and personal property. As to his personal property, it was administered by his executors during the lifetime of Frank P. March, and his share thereof was paid over to him. After his death the trustees sold a parcel of the testator's real property, in Norfolk, Va., receiving therefor the sum of \$150,000, which is now in the hands of the plaintiffs, subject to distribution under the provisions of the will; and the question is as to whether the share thereof which Frank would have been entitled to had he lived, passes under his will to his legatees and devisees, or goes to his daughter, Mary McIlvaine, under the will of her grandfather, Peter S. March. The answer to this question depends upon the construction to be given to subdivision 4 of the fifth clause of the will, which, as we have seen, provides that, in the event of the death of any of the testator's children before the conveyance and payment to him of his share of the testator's estate, such share shall be conveyed and paid over to his issue absolutely. It is not contended that this provision of the will is illegal, that it is violative of any statute or common law, or that it is against public policy. The only question is,

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

what did the testator intend. In ascertaining such intention we are required to take into consideration the surrounding circumstances under which he framed the provisions of the will, the situation of his estate and of the members of his family whom he wished to be the recipients of his bounty. (*Williams v. Jones*, 166 N. Y. 522-532.) In considering these circumstances for the purpose of ascertaining the intention of the testator, there is a presumption which we must bear in mind, and that is that in the absence of unfriendly relations existing between testators and their descendants, there almost invariably exists a desire and an intention on the part of testators that their property should go to their descendants, rather than to strangers to their blood.

Upon referring to the findings of fact it appears that the testator was possessed of a personal estate, amounting to the sum of \$230,000 over and above his liabilities; that he also was possessed of the real property in Virginia, from which the sum of \$150,000 has been derived upon its sale; that he had a wife and six children, four boys and two girls, all of whom were adults; that one son, Frank P., and one daughter, Laura J., had married; that Laura J. had no children, but Frank P. had a daughter, Mary McIlvaine, who appears to have been the only surviving grandchild of the testator. It does not appear that any trouble had occurred between Frank and his wife or daughter at the time the will in question was executed, or during the lifetime of the testator. These are the circumstances under which we are called upon to determine the intention of the testator and ascertain whether he has disinherited his grandchild. In so far as the testator created a trust in favor of his wife, it appears that he survived her, and, therefore, that provision, upon his death, became of no force or effect and may be disregarded. We then have remaining a gift and devise of all the residue and remainder of his estate, both real and personal, to the executors and trustees named in his will for the purpose of establishing three separate trusts, one in favor of each of his daughters and the other in favor of his son Seth S. March,

to continue during their respective lives, to each of which trusts was given one-sixth of his residuary estate; the other three-sixths were directed to be conveyed and paid over to his three sons, Edwin, Frank and Egbert. Then we have the provision, "That in the event of the death of any of my children before the conveyance and payment to him of the share of my estate herein given to him, or of either of my children whose share of my estate is held in trust, that my executors convey, pay and assign the share of the one so dying to his or her issue absolutely, and if he or she shall leave no issue then that they convey, pay, assign and divide such share or the proceeds thereof to and among my surviving children," etc. The personal estate, as we have seen, had been administered by the executors, the debts paid and the amount due Frank paid over to him during his lifetime. We have, therefore, only to consider the real estate. This the executors and trustees were directed to sell at public or private sale and at such times and on such terms as they might think proper. This provision was doubtless mandatory and operated to convert realty into personalty. (*Lent v. Howard*, 89 N. Y. 169; *Hope v. Brewer*, 136 N. Y. 126-134.) But this does not affect the discretionary power given as to the terms and time of the sale. When the sale was made and the proceeds received it became the duty of the trustees to set apart three-sixths thereof for the benefit of the three trusts created in favor of the two daughters and the son Seth, and to pay the other three-sixths thereof to the other son. The executors and trustees, it appears, did proceed and sell the Virginia property. It is found as a fact and conceded upon the argument that such sale was made in good faith by the executors and trustees, and at the earliest date at which it could properly have been made. But at the time the sale was made Frank had died, leaving his daughter, Mary McIlvaine, his only surviving issue. Referring again to the provisions quoted we find two distinct classes referred to. The first embraces any of his children dying before the conveyance and payment to him of his share of the estate, clearly meaning the three sons, who were entitled

to their shares after the sale and conveyance of the real estate had been made; and the other to either of his children dying, whose share of his estate had been placed in trust, thus including the two daughters and his son Seth. So that in case of the death of any of the sons whose estates were not in trust before the conveyance and payment to them, or in case of the death of either of the children whose estates had been put in trust, the direction was to pay and assign the share of the child so dying to his or her issue absolutely. To my mind there is no possible doubt but that the testator intended that the fund should go to his grandchild. Indeed, I cannot see how more clear and concise language could have been used expressive of such intent, and none has been suggested. While it seems to be conceded that the language used, literally construed, would signify actual payment, yet it is contended that such a construction would be so unreasonable that the courts ought not to adopt it, unless the intention of the testator has been expressed in language so clear and positive as to leave no room for possible doubt; that the objections to a literal interpretation are that it would not only leave the testator's bounty subject to accident which he could in no manner foresee, but also empower those intrusted with the execution of his will to vary or change its provisions at their own pleasure. My answer to this is that a testator's bounty is always subject to accident until it reaches the possession of the person for whom it was intended. If personal property, it may be lost, stolen by thieves, or destroyed by fire; but none of these accidents could affect the intention of the testator or the construction that should be given to his will. Every person is liable to die, and no testator can foresee the time or manner of the death of a devisee or legatee. The death of such a person may change a testator's property from one channel into another, but how could this affect the original purpose or intent of any particular testator. Finally, it is urged that if actual physical payment of the fund into the hands of the legatee is necessary, then the executor might, through litigation or otherwise, postpone the payment until after the

death of the legatee and thus divert the legacy into another channel. But no one contends that actual physical payment of the fund into the hands of the legatee is necessary. That is not the question here presented. Of course, executors and administrators cannot change the rights of parties by improper litigation. No such question has been presented in this case. The executors and trustees have acted in good faith, have sold the real estate and converted it into money as soon as it was possible or proper for them to do so, and have fully performed their duty in that regard, as has been found and conceded in this case. If they had not performed their duty in that regard, Frank, during his lifetime, had his remedy to enforce such performance. The question in this case is, when did the fund become due and payable to Frank; when could he have maintained an action against the trustees to recover his share of the proceeds of the real estate. Under the will they were required to sell at such times and on such terms as was proper. The fund derived from the sale was then to be distributed in the manner specified in the will. It was then that Frank's share became due and payable; then he was entitled to have it in possession; then he could have maintained an action to recover it. But when that time arrived, as we have seen, he had died, and under the terms of the will his right thereto passed to his only surviving child.

In construing wills the rule is that we should consider all of the provisions, and, so far as possible, construe each in harmony with the others, giving force and effect to all. Applying this rule to the provisions of subdivision 4 of the will we are required to give force and effect to the first provision, which has reference to the death of the three sons before the conveyance and payment to them of their share of the estate, as well as to give force and effect to the second provision, which relates to the death of those children whose estate is by the terms of the will put in trust. If, however, we are to adopt the contention of the appellants, it follows that the first provision must be eliminated and entirely dis-

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

regarded as having no force and effect whatever. To avoid such a violation of the rule of construction it is now suggested that the death of any of the children therein referred to meant death within the lifetime of the testator. Not so. The provision does not so state and cannot be so read. The executors and trustees had no power in the lifetime of the testator to sell and convey his real estate, or to pay over the proceeds of such sale to the beneficiaries until after his death and the will had been admitted to probate. The death referred to, therefore, must have been a death after that of the testator and before the "conveyance and payment" to such child of his share of the estate. His share of the estate could not be determined until the sale had been made, the proceeds collected, and the amount ascertained, at which time it became due and payable, and not until then. The death referred to was the death of a child occurring "before" the happening of such sale, not before the death of the testator. If it referred to a death during the lifetime of the testator, then it would logically follow that it meant the same thing with reference to the second provision, pertaining to the estates of the three children for whom trusts were created, a construction which no one so far has contended for as proper. If such were its meaning, then the clause would be meaningless and of no force or effect; for under the statute a legacy payable to a child of the testator does not lapse by reason of his death before that of the testator, where he has children living who can take in his place.

While conceding that the words used in the will, literally construed, would signify actual payment and indicate an intent on the part of the testator that upon the death of Frank before such payment his share should go to his child, it is contended that such literal construction ought to be rejected for the reason that Lord THURLOW over a century ago said: "Suppose he had given a real estate in the manner you specify, it is clear that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness. In some way it

may be sold immediately, but I should not inquire when a real estate might have been sold with all possible diligence." This quotation is to be found in the case of *Hutcheon v. Mannington* (1 Ves. 366). In that case Hutcheon died in the East Indies possessed of a personal estate amounting to the sum of £8,627. By his will he gave certain legacies to his brothers and sisters and to his father, the will containing a provision that in case of the death of either of them before receiving the legacy, it should go to the children of the legatee so dying. The father died after the testator, but before he had received his legacy. It was claimed that inasmuch as the personal estate was in the East Indies it did not vest until sufficient time had elapsed to transport the same to England. With reference to this the lord chancellor said: "I rather believe he had some such purpose as you attribute to him, in his contemplation. There is a faint indication of a purpose, that there shall be some time or other when these interests shall go over, and that they shall not vest in the meantime. But has he conceived that intention and expressed it with such definite certainty that I can act upon it? I am to compute what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain." He concluded by holding that they vested on the death of the testator. In the case of *McKinstry v. Sanders* (2 T. & C. 181) the will of the testator provided that his real and personal estate should be converted into cash and a certain legacy paid; that if there was any surplus remaining it should be paid over to his nephews and nieces "who shall then be living to be equally divided between them." After the testator's death two nieces died before final distribution, and it was held that the provision "who shall be living," meant the nephews and nieces who were living at the time of the testator's death, and that their interest became vested as of that date. This is in accord with a number of decisions in this court, and the correctness of the conclusion is not questioned. But it will be observed that it has no application to the question under consideration, for

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

there is no provision in the will divesting the nephews and nieces, or either of them, of their share in the estate by their death after that of the testator and before final payment. In *Finley v. Bent* (95 N. Y. 364) the testator, after making certain provisions for his wife, devised and bequeathed all the residue of his estate, both real and personal, to his executors in trust, with directions to sell and dispose of his real estate as soon as they conveniently could after his decease, and then divide the proceeds into three shares, one for each of his three children, and to invest the shares separately upon bond and mortgage on real estate, or in interest-bearing securities of the state of New York or of the United States. At the expiration of one year from the death of the testator each child was to be paid out of the principal of his or her share the sum of \$7,000, at the expiration of two years the sum of \$5,000, and at the expiration of five years the balance of his or her respective shares. The will then provided that, "Should either of my children die before the full payment of the whole of his or her share of such residue, then my executors shall pay the share of the child so dying, or so much thereof as shall remain unpaid, to his or her lawful issue then surviving." One of the daughters died after the expiration of five years, leaving a husband and an infant son. At the time of her death a portion of the real estate had not been converted into money. It was held that inasmuch as the will fixed a definite period, to wit, five years, from the death of the testator when she should be paid the balance of her estate, it became due and payable as of that date, and was, therefore, in the law deemed absolutely vested in her, and that the provision of the will containing a provision with reference to her death before full payment meant a death before the expiration of the five years, the time fixed in which her share became finally due and payable. This case I shall have occasion to refer to later on. These are the cases upon which it is contended that we are concluded by authority from giving to the language used in the

will the literal meaning which the testator evidently intended, thus preventing the estate from going to his grandchild.

In the case of *Gaskell v. Harman* (11 Ves. 489-496) the chancellor, Lord ELDON, in commenting upon the conclusion reached by Lord THURLOW in *Hutcheon v. Mannington*, admitted that he differed from the conclusion reached by his lordship as to the construction given to the will, and that he entertained the view that the natural construction was to the effect that if the legatee should die before the property should be actually paid to him the gift over would take effect. But he considered the case as an authority to the effect that the language used must be clear and specific, asserting the soundness of the proposition that "If a testator thinks proper, whether prudently or not, to say distinctly, showing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies, or the residue, unless they live to receive them in hard money, there is no rule against such intention if clearly expressed." And to the same effect is the case of *Law v. Thompson* (4 Russ. 92-100). In *Johnson v. Crook* (L. R. [12 Ch. Div.] 639) the testatrix had by her will made certain provisions for Thomas Keeling and Joseph Gill and then concluded: "But in case the said Thomas Keeling shall depart this life before he shall actually have received the whole of his share of the said residuary moneys, effects and premises, and without leaving any issue of his body living at his decease or born in due time after, then and in such case, and whether the same shall have become payable or not, I direct, limit or appoint that his share of and in all the aforesaid residuary moneys, effects and premises, or (as the case may be) such part and parts thereof as he shall not have actually received as aforesaid, shall be paid, assigned and transferred unto the said Joseph Gill, his executors, administrators and assigns." Joseph Gill died in 1847. Thomas Keeling died in 1850, without ever having been married, and before receiving his share of the residuary estate. The controversy arose between the executors of their respective estates. JESSEL, Master of the Rolls, reached the conclusion that the provisions of the will

were clear and specific, and that "actually received" meant "actually received;" and that there was no statute law or common law which prevented the carrying out of the intention of the testatrix; and that, "if there was anything to prevent it, it must be found in some law manufactured by the judges in the equity jurisdiction;" and after a consideration of all the cases bearing upon that subject, including the opinion of Lord THURLOW, above alluded to, he reached the following conclusion with reference thereto: "I should now be establishing a new law applicable to wills if I refused to give the natural interpretation to these words which are so plain and clear as not to be the fair subject of controversy." He, therefore, held that the interest of Keeling upon his death was given over to Gill, or to his executors, administrators and assigns. In *In re Wilkins* (*Spencer v. Duckworth*, L. R. [18 Ch. Div.] 634) the testator, Wilkins, gave his residuary estate to four persons, to be equally divided between them, with a provision that in case either die before the final division of the estate his share should go to his children. Two of the legatees died more than a year after the death of the testator. The estate had not then been fully distributed. It was held that under the practice of the court twelve months were allowed after the death of the testator in which the executors were required to wind up his affairs, pay his debts and distribute his estate; that in so far as the two deceased legatees survived that period, their shares became due and payable, and, therefore, the legacy did not go over on their subsequent death. FRY, J., however, in delivering his opinion, expressly concurs in the views of the master of rolls, as expressed in the case of *Johnson v. Crook* (*supra*). In *Sampson v. Sampson* (L. R. [1 Ch. Div. 1896] 630), after referring to the cases in which there has occurred a gift over on the death of a legatee before actually receiving his legacy, STERLING, J., says: "These cases are not entirely consistent among themselves; but this at least they establish — that whether or not a testator can effectually cause a vested gift to be divested before it has actually come to the hands of the legatee, such an intention

ought not to be attributed where the words are not clear; and in cases where the words are susceptible of such an interpretation, the court has held that the period over which the operation of a divesting clause of this kind is to extend ought not to be held to continue beyond that at which the legacy is *de jure* receivable." In *Whitman v. Aitken* (L. R. [2 Eq.] 414) the testator bequeathed to his nephew, David Maxwell Aitken, £2,000, "and in case of his death before the same shall be actually paid or payable to him, then the trustees or trustee for the time being of this my will shall stand possessed thereof, or the securities whereon the same shall be invested, in trust for all the children of the said David Maxwell Aitken, whether born in my lifetime or after my decease, who being a son shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares or proportions, and in case there shall be only one such child, then for such one child, and in case no child of the said D. M. Aitken shall acquire a vested interest, then in trust in like manner for all the children of my nephew, J. M. Kitson Aitken." David Maxwell Aitken did die after the testator, and before any part of the £2,000 had been paid over to him or appropriated for that purpose from the estate, leaving an infant daughter. In that case the same claim was made, as in this case, that the legacy became vested in David Maxwell as upon the death of the testator. Sir J. STEWART, V. C., in his opinion, said, with reference thereto, that: "Where the language is ambiguous the court will undoubtedly look to the context to ascertain the testator's meaning, and even where the words are clear in themselves they may be controlled by the context. But the first rule of construction is, that where the language of the testator is clear, and involves no inconsistency or contradiction with other parts of the will, those clear words must prevail. In this case the literal meaning is perfectly plain and rational, and must have its due effect. The gift is to D. M. Aitken, but if he dies before it is actually paid or payable, then the property is to be held for his children. It is admitted that

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

the legacy was not paid. Then what is the meaning of the word payable? That refers to the death of D. M. Aitken in the lifetime of the testator. It is, therefore, plain that there were two events, upon the happening of either of which the gift to the children was to take effect. If D. M. Aitken should die in the lifetime of the testator the legacy is not payable, and his children are to take it. If he survives the testator, but dies before the legacy is actually paid to him, his children are to take." In *Goulder v. Goulder* (L. R. [2 Ch. Div. 1905] 100) the testator in his will made provisions for his brother John, with a proviso that in the event of his brother "being unable at the time of my decease, or at any time prior to the actual payment to him of his share, or any part of his share on the division of my estate, to give a receipt to my trustees for his share by reason of his having committed or suffered any act whereby he has deprived himself of the right to the benefit of such share, either in whole or in part, then I direct my trustees to stand possessed of the share of such brother, or that part of such share which my said brother is unable to receive for his own benefit upon trust for the brother's children." When the estate became ready for distribution the brother had been adjudged a bankrupt and a trustee appointed who claimed the fund. It was held, however, that the words "prior to the actual payment" should be read literally, and that the share which the brother was then unable to receive was given over to his children, approving of the case of *Johnson v. Crook* and the other cases in accord therewith. So much for the English authorities upon the subject.

In *Tyson v. Blake* (22 N. Y. 558) the testator, after providing for the payment of debts, etc., gave the whole of his estate to his four grandchildren in equal shares. As to Emeline, one of them, he provided that in case she should die without lawful issue, her share should go to the other three. COMSTOCK, Ch. J., says that "Emeline, therefore, took under this will more than a life estate. If she had left children they would have taken, not as legatees of the testator, because nothing was given to them, but in succession to their mother

and according to the laws of distribution; in other words, as her next of kin. But a general bequest of personal estate, like a fee in lands, can be subjected to a limitation over on a condition which is not too remote. If the direction is that it shall go to another beneficiary, on a contingency which must happen at the death of the first taker, the limitation is within the rules of the law and will be sustained." In the case of *Vanderzee v. Slingerland* (103 N. Y. 47) the testator, by the second clause of his will, gave to his son, Cornelius, all his real estate situate in the county of Albany. By the tenth clause of his will he provided: "In conclusion, my will is that if my son, Cornelius, dies without issue, that then the estate herein devised to him shall go over to my grandchildren," specifically naming them, "* * *" and in case my son, Cornelius, should die before the provisions of this will become an act, the devisees last named shall perform and fulfill all the conditions required of my son, Cornelius, to the legatees named in this my will." Cornelius survived the testator, and subsequently died without issue. It was claimed that the death of Cornelius, referred to in the will, was a death occurring during the lifetime of the testator, and that he, having survived the testator, took a fee absolute in the estate devised to him. ANDREWS, J., in delivering the opinion of the court, conceded the rule to be, that where a bequest is simply to one person and in case of his death to another, the primary devisee surviving the testator takes absolutely; that this rule applies both to real and personal estate. But it was a question of intention, and the rule thus referred to "applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue or other specified event. Indeed, the tendency is to lay hold of *slight circumstances* in the will, to vary construction and to give effect to the language according to its natural import." He concluded by holding that the words "die without issue" referred to a death at any time, whether before or after the death of

the testator; that Cornelius took a conditional fee, and the grandchildren a contingent interest by way of executory devise, which, upon the happening of the contingency provided for, the death of Cornelius without issue, their contingent interest was converted into a fee. To the same effect is *Nellis v. Nellis* (99 N. Y. 505); *Buel v. Southwick* (70 N. Y. 581); *Hennessy v. Patterson* (85 N. Y. 91); *Matter of Cramer* (170 N. Y. 271). In *Matter of Wiley* (111 App. Div. 590) the will devised the residuary estate to the testator's wife and to specifically named sisters, nephews and nieces, share and share alike; and then provided that, in case of the death of either before the whole estate shall be divided, it shall be distributed among the survivors only, share and share alike. One of the nephews was killed after the death of the testator and before any part of the residuary estate had been divided by the executors among the residuary legatees. It was held that he having died before the period of distribution arrived, the limitation over took effect.

The only other case to which I wish to specially refer is that of *Finley v. Bent* (95 N. Y. 364), to which I have already alluded, stating the facts and the holding with reference thereto. This is the case to which the chief judge refers when he says that we are concluded by authority. The effect that is to be given to this case is, I apprehend, our chief point of difference. As we have seen, the share of the estate in controversy was payable to a daughter in one, two and five years from the testator's death. At the expiration of five years her entire share became due and payable. The testator had given the executors what he deemed ample time in which to sell and dispose of his real estate, in order to meet and pay the legacies as they matured and became due. At the expiration of five years this daughter was alive. She had the right to have her share paid over to her and could have maintained an action therefor. It, therefore, became absolutely vested in her, and upon her subsequent death it passed to her legal representatives. This was in accord with *In re Wilkins* (L. R. [18 Ch. Div.] 634), to which I have referred, in which the

legatees were entitled to their legacies one year after the death of the testator, and having survived that period their shares became due and payable, and, therefore, did not go over on their subsequent death. But that is not the question which we are called upon to determine. The question presented by this case is as to the effect of the death before the legacy becomes due and payable, before the time that the legatee has the right to demand its payment or maintain an action therefor. This question was considered by EARL, J., in the case of *Finley v. Bent*. He says: "It is conceded that the direction contained in the will to the executors, to sell the real estate, operated as a conversion thereof into personalty, and hence for the purposes of this will, and its construction, and the devolution of the estate, it must be treated as personalty from the time of the testator's death. It is clear, from the language used, that the shares given to the children vested at once upon the death of the testator. The remainder of the proceeds of the residue of the real and personal estate was without delay, after the death of the testator, to be divided into three shares, one for each of his children. * * * But each share was *liable to be divested*, as to so much of the share as within the meaning of the will remained unpaid, in case of death before full payment." He then refers to the claim of the appellant with reference to the words "die before full payment," meaning before actual full payment, and then he said with reference thereto: "If that be the meaning, then within the case of *Johnson v. Crook* (L. R. [12 Ch. Div.] 639), the contention of the appellant *is sound*, and the share upon the death of Abby passed under the will to her son." He then proceeds to show that the meaning of the words "die before full payment" mean "before the share becomes payable; and, therefore, inasmuch as the daughter died after the whole share was payable, the share was not divested, and passed as part of her estate." In other words, if the daughter had died before the five years had expired, at which time the share became due and payable, the share would have divested and passed under the will of her father to her son. It, therefore,

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

appears to me that this case is an authority in support of the judgment we have under review. (*Hoadly v. Wood*, 71 Conn. 452.) Underhill, in his work on the Law of Wills (Vol. 1, sec. 343), has summed up the authorities upon the subject as follows: "Clauses by which property is given to A. absolutely, with a limitation over in case A. shall die before receiving his legacy, primarily refer to his death before it is actually received by him in cash, whether he die before or after the death of the testator. Though A. may survive the testator, the legacy to him is contingent upon his surviving to receive it. If the testator expressly directs that the legacy shall be paid at some particular point of future time, as five years from his death, or at the expiration of a life estate, with a gift over in case of the death of the legatee before receiving the legacy, it will vest at the date when it ought to be received, though its actual payment shall be delayed by the caprice or the wilfulness of the executor. The difficulty in construing these limitations over is most striking when they depend upon death simpliciter, without having received the legacy, the testator having omitted all words which would indicate that he meant an actual receipt. In a recent case, where the testator provided that in the event of the death of a remainder-man 'leaving issue before receiving his share, the issue should take,' it was held that a remainder-man who survived the testator took a vested estate at the death of the testator. Receiving here meant possession. The same rule is applied where the will is silent as to the time of payment and the legacy is immediate. Thus, where a legacy is not expressly payable in the future, and the will provides a gift in case of the legatee's death before receiving his share of a residue, or before the 'division' of the estate, and the legatee survives for one year after the testator, which period is allowed by law for the settlement of the estate, the legacy is indefeasibly vested, though, if he die during the year, the gift over takes effect. The fact that the executor may, if he choose, pay the legacy before the year expires does not accelerate the vesting, for the executor cannot favor one legatee as against another.

Until the year has elapsed the legacy is undoubtedly contingent. And it has been held that equity will not direct that inquiry shall be made into the circumstances of the estate in order to ascertain whether the payment could have been made without inconvenience before the death of the legatee, or within one year from the death of the testator, even if the legatee has survived that period for several years. Cases which provide for a gift over in the event of the death of the legatee before he has actually received a legacy differ radically from those in which an actual receipt is not required. Where it is clearly apparent that the testator intended that the legatee should be at the risk of losing what he gave him through the delay or the caprice of the executor, or through accident, as in case it is expressly provided that if the legatee should die before he shall have 'actually received his legacy' the part 'he has not actually received, whether payable or not,' is to go to another, the intention must be respected. The gift over is not invalid for its uncertainty, merely because it is within the power of the executor to defeat the intention of the testator respecting it, by a prompt payment of the legacy, if it is clear that the testator intended he should possess that power. Whether the executor shall possess this power depends upon the language of each will. Its existence must clearly appear, as nothing will be taken by implication in this respect."

The testator's personal estate, as we have seen, had been distributed, and Frank in his lifetime received his share. The real estate in Virginia had not been sold or converted into money, for the reason that a purchaser could not be found. It is conceded that the sale was made at the earliest date in which it could properly be made. The proceeds could not be distributed until the sale was made and the money received. Had that event occurred during the lifetime of Frank, then it would have become due and payable, and he could have maintained an action therefor. But his death occurred before the happening of that event, and, therefore, the divesting clause of the will became operative, and the share coming to

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

him under the provisions of his father's will passed to his daughter.

It may be conceded that the English cases are not all in entire harmony. Their chief difference, however, arises out of a diversity in phraseology in the various wills which the courts have been called upon to construe. They all apparently concede that the intention of the testator must control, where the divesting clause is so clearly and specifically stated as to admit of no other construction. Even Lord THURLOW conceded this. But he claimed in the case before him that the testator had not conceived and expressed his intention with such definite certainty that he could act upon it. The great weight of authority, especially the recent cases, support and approve the rule laid down in *Johnson v. Crook*, and some of the cases criticise the conclusion reached by Lord THURLOW with reference to the provision being sufficiently definite and certain for him to act upon. It may further be conceded that under the provisions of a will containing a gift over in case of the death of a legatee before payment, that actual payment is not essential in order for it to vest absolutely in a legatee; that under the authority of *Sampson v. Sampson* (*supra*) the divesting clause ought not to extend beyond the period in which the legacy is *de jure* receivable, or becomes due and payable, thus avoiding the power of an executor, through delay, caprice or accident, from preventing an absolute vesting of a legacy. With this limitation no reason is apparent, either in law, public policy or morals, why the testator may not make his bequests subject to a provision, clearly and definitely stated, that in case his legatee should die before his legacy become due and payable under the administration of his estate, it shall go over to the child or children of such deceased legatee, and thus prevent its going to the creditors of the legatee or to strangers to the testator or to his blood.

I consequently conclude that Frank took a contingent estate, which would become vested absolutely in case he lived until he was entitled to it in possession, or until it became due and

Dissenting opinion, per CULLEN, Ch. J.

[Vol. 186.]

payable to him, subject to be divested in case of his death before that time, and he having so died, his share passed over to his daughter under the will of his father.

The judgment should be affirmed, with costs.

CULLEN, Ch. J. (dissenting). This action was brought for the construction of the will of Peter S. March, who died in the city of New York on February 11th, 1899. The questions litigated arise under the fifth clause of the will, by which the testator devised the residue of his estate, real and personal, to his executors and trustees in trust:

"First. That my Executors and Trustees sell, convey and dispose of the same at public or private sale at such times and on such terms as they may think proper.

"Second. That my Executors and Trustees invest and keep invested during the life of my wife one-third part of such residue of my estate, or the proceeds thereof, and pay or apply the rents, interest and income thereof to the use of my wife so long as she shall live.

"Third. That my Executors and Trustees divide the remainder of such residue (and on the death of my wife the one-third part held for her benefit) into six equal parts or shares, and convey, pay and assign one of such shares to my son Edwin P. March, first deducting the said sum of Fifteen thousand Dollars as herein directed; that they convey, pay and assign one other of such shares to each of my sons, Frank P. March and Egbert G. March, absolutely; that my Executors and Trustees set aside and designate one of the remaining three shares for each of my daughters, Virginia A. March and Laura J. Adams, and son Seth S. March, and hold, invest and keep invested the share of each child last named during his or her life, and collect and receive and pay or apply the rents, interest and income of the share of each child to the use of such child during his or her life, and upon the further trust,

"Fourth. That in the event of the death of any of my children before the conveyance and payment to him of the

N. Y. Rep.] Dissenting opinion, per CULLEN, Ch. J.

share of my estate herein given to him, or of either of my children whose share of my estate is held in trust, that my executors convey, pay and assign the share of the one so dying to his or her issue absolutely, and if he or she shall leave no issue, then that they convey, pay, assign and divide such share or the proceeds thereof to and among my surviving children and to the issue of any deceased child, such issue to take by representation the part or share his, her or their parents would have been entitled to, if living."

The testator's wife predeceased him. The testator's son Frank P. March died testate on May 10th, 1900, leaving a widow and daughter, Mary M. Kennedy, his only heir at law and next of kin. Peter March, at the time of his decease, was the owner of real property in the state of Virginia which was not sold by the executors and trustees until after the death of Frank March, but the latter received during his lifetime his share of the other parts of his father's residuary estate. The present contest is between the personal representatives of Frank March and his daughter, Mary Kennedy, and the most important question is as to their respective rights in Frank's share, or what would have been his share had he lived, in the proceeds of the sale of the Virginia property, the personal representatives of Frank claiming it under the third subdivision of the fifth clause of Peter March's will, the daughter claiming under the gift over or substitutional gift contained in the fourth subdivision. As to two propositions there is no dispute: *First*, that the power of sale was mandatory, and hence there was an equitable conversion of the lands in Virginia into personalty; *second*, that under the fourth subdivision, standing alone, Frank would have acquired on the testator's death an indefeasible title to his share of the estate. The respondent, however, contends that the proceeds of the Virginia property not having been paid to Frank, she is entitled under the fifth clause, which directs that in case of the death of any of the testator's children "before the conveyance and payment to him of the share of my estate herein given to him," the executors shall convey, pay and assign

such share to his or her issue. This branch of the controversy turns wholly on the interpretation to be given to the words "conveyance and payment." If those words mean the actual payment in hand to the son in money, then the respondent, the daughter, is entitled to the fund, and so the courts below have held. On the other hand, if, as the appellants contend, the words are to be construed as meaning before the son is entitled to the fund or the same is payable to him, then the fund should be paid to the personal representatives of the son.

While, literally construed, the words would signify actual payment, the results of such a construction have seemed to the courts so unreasonable that they have refused to accord to them that interpretation unless when the intent of the testator has been expressed in language so clear and positive as to leave no room for possible doubt. The objections to a literal interpretation are that it would not only leave the objects of the testator's bounty subject to accident, which he could in no manner foresee, but also empower those intrusted with the execution of his will to vary or change those objects, at least to some considerable degree, at their own pleasure. If actual physical transfer of the fund into the hands of the legatee is necessary to constitute payment, in default of which the gift over or substitutional gift takes effect, then any delay in carrying the provisions of the will into execution, any litigation over the probate of the will or as to its assets after probate would divert the testator's property from one channel into another. These considerations led Lord THURLOW, over a century ago, to reject the literal interpretation, saying: "Suppose he had given a real estate in the manner you specify, it is clear that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness; in some way it may be sold immediately; but I should not inquire when a real estate might have been sold with all possible diligence." The respondents' counsel places great reliance upon the case of *Johnson v. Crook* (L. R. [12 Ch. Div.] 639). There the direction of the will was: "But in case the said Thomas Keeling

N. Y. Rep.] Dissenting opinion, per CULLEN, Ch. J.

shall depart this life before he shall actually have received the whole of his share * * * and whether the same shall have become payable or not, I direct * * * such part and parts thereof as he shall not have actually received as aforesaid, shall be paid, assigned and transferred unto the said Joseph Gill." In the face of such language there was no room for doubt as to the intention of the testator. Counsel for the primary legatee did not question the construction of the will, but contended the gift over was void for uncertainty, as whether it took effect or not might depend on the diligence or dilatoriness of the executor. It was the validity of such a gift, not the interpretation of the testator's language, that was considered in that case, and there is nothing contained in the opinion of the master of the rolls inconsistent with the doctrine of the earlier cases. In fact, the master of the rolls concedes the doctrine of those cases as to the interpretation of such a provision in a will, but contends they are not authority for the proposition that if the direction of the testator, to make the gift over depend on the absence of actual payment, is indisputably expressed the gift would be void.

The argument of Lord THURLOW is presented in substance though very much elaborated in *McKinstry v. Sanders* (2 Thompson and Cook, 181), which case was affirmed by this court on the opinion rendered in the Supreme Court. There was a direction to sell and convert the real estate, pay debts and certain legacies, provide for certain annuities, and upon the settlement of the estate, if it did not exceed the sum of twenty thousand dollars, pay over the moneys remaining to the trustees of a church, but if upon settling the estate there should remain more than twenty thousand dollars, then divide the excess to the testator's nephews and nieces "who shall then be living, to be equally divided between them." It was held that the representatives of the nephews and nieces who survived the testator, but died before the real estate was converted or the estate settled, were entitled to share in the distribution. It was there said: "In the case of Mrs. Sanders (a niece) the property was all in existence when the testator

died, and one year afterward, when she died. Perhaps, with reasonable expedition in the transaction of the business, the executor may have been able to realize from the real and personal estate, so as to have ascertained what the fund was and have been ready to distribute, if the law would allow such distribution, before her decease. Can it be said that because this was not done that she lost her right to the legacy, and it never became vested. I think such a rule would be at war with the intention of the testator, and cannot be upheld upon any legal basis." Again, in reference to the power of sale, it is said: "Strictly construed, he was also at liberty to wait until all died but himself before making a settlement, and thus secure to himself, if he should survive, the whole estate which remained. Conceding that this time should be reasonable, and that the executor might be compelled to distribute, by an action at law, still, before the case could be brought to a final determination, some one or more may have died and by the delay have been deprived of the interest intended to be bequeathed. It cannot be supposed that the testator could have had any intention thus to vest the executor with a power so arbitrary." All this is equally true of the case before us, and though it is conceded that the executors properly discharged their duties (which was equally the fact in the *McKinstry* case) the question is not what has been done, but what might have been done.

But in my view it is unnecessary to pursue the argument, for in the disposition of this case we are concluded by authority. In *Finley v. Bent* (95 N. Y. 364) the testator directed his executors to convert his real estate, divide the proceeds thereof into shares and invest the same for the benefit of his children, paying the income to them respectively. At the expiration of one year from his death they were to pay each child out of the principal of his share seven thousand dollars; at the expiration of two years thereafter five thousand dollars, and at the expiration of five years the remainder of the share. The will then provided that in case of the death of any child "before the full payment of the whole of his or

N. Y. Rep.] Dissenting opinion, per CULLEN, Ch. J.

her share of such residue" the executors should pay the share of the child, or so much thereof as then remained unpaid, to his or her lawful issue. A child died after the lapse of five years, but the real estate not having been sold at that time, the whole of the share was not received by her. There the contest was, as in the present case, between a grandchild and the representatives of its parent over the proceeds of real estate sold after the parent's death. This court stated the general rule to be: "A limitation over, to take effect in case of the death of the legatee before he has received his share, does not take effect if the legatee lives to become entitled to it, though he die before it has been paid," and held that the representatives of the daughter of the testator were entitled to the fund.

It is urged that the proceeds of the real estate could be payable only after the real estate was sold, because until such sale it was physically impossible there should be any proceeds to pay. This argument overlooks the fact that in law the conversion of the real estate is held to take effect as of the instant of the testator's death, and that when actually made the condition of the proceeds relates back to that time. From the moment of the testator's death the conversion took place and the land became money for all purposes of administration. (*Horton v. McCoy*, 47 N. Y. 21; *Fisher v. Banta*, 66 N. Y. 468.) Nor is this a mere legal fiction; on the contrary, while the land would descend to the heirs at law subject to the execution of the power, such heirs would take only a naked title, and the rents and profits of the land prior to the sale would go, not to the heirs, but to the legatees of the proceeds of the sale. (*Moncrief v. Ross*, 50 N. Y. 431.) Such legatees may, if under no disability, with the concurrence of all, elect to take the land and thus defeat a power of sale. (*Greenland v. Waddell*, 116 N. Y. 234.) Therefore, until the exercise of the power of sale the testator's son Frank was the equitable owner of his share of the father's real estate, and the transfer and conveyance to him was immediate on his father's death, by the terms of the latter's

will. Hence, if we look at what may be termed the physical attributes of the property, the only effect of a subsequent sale under the power was to transmute what Frank already possessed as land into money. But the question was in the *Finley* case the same as it is in the present one, and there it was as impossible to physically pay over the proceeds of land as it is here. Nor is there any difference in the provisions of the two wills that affect the question. There the payment and transfer was to be made after the lapse of years; here the gift to the testator's sons is immediate, for no formal conveyance by the executors is necessary.

Lastly, it is urged that the construction of the appellants renders the fourth subdivision meaningless or unnecessary. Not so. As to the share of any son dying before the testator, it was intended to vest such share in his issue. It is true that such a provision, in case of the death of a child before the testator, is, under our statute, now unnecessary; nevertheless it is constantly inserted and properly so, because the testator may leave real property in jurisdictions where no such statute exists. Moreover, there was one contingency and that one contemplated by the testator and appearing on the face of his will, in which the provision would be both effective and necessary. Had the testator's widow survived him and any child died before her death, then under this clause such child's share in the trust fund for the widow would go to his issue and not to his personal representatives.

I am of opinion, therefore, that so far as relates to the proceeds of the Virginia real estate the judgment below should be reversed and the fund awarded to the appellants.

A further question was litigated on the trial and has been decided by the judgments below of the rights of the respective parties to share in the trust funds provided for the testator's daughters, in case any such daughter should die without issue; that is to say, whether in such case a share of the fund should be awarded to the appellants or to the respondents. The courts below have held that in that event the respondent will take. We think this decision correct. There

N. Y. Rep.]

Statement of case.

is no direct gift in such contingency of the remainder of the share, and the general rule is "where the only words of gift are found in the direction to divide or pay at a future time, the gift is future, not immediate; contingent, not vested." (*Matter of Crane*, 164 N. Y. 71; *Matter of Baer*, 147 N. Y. 348; *Rudd v. Cornell*, 171 N. Y. 114.) It must be confessed that this rule readily yields to anything in a will which appears to indicate a contrary intention, but in the present case, so far from there being anything in the will to indicate such an intention, the application of the rule harmonizes with the general testamentary scheme that interest should not vest until there is a right of present enjoyment.

The judgments of the Appellate Division and of the Special Term should be modified in accordance with this opinion, with costs to both parties payable out of the fund.

O'BRIEN, VANN and WILLARD BARTLETT, JJ., concur with HAIGHT, J.; WERNER and HISCOCK, JJ., concur with CULLEN, Ch. J.

Judgments affirmed.

ANNA T. GILLIAM, Respondent, v. GUARANTY TRUST COMPANY OF NEW YORK, as Trustee of a Fund for the Benefit of FRANCES J. DYETT, Defendant.

JAMES S. DYETT et al., Appellants.

1. REAL ESTATE—TRUST DEED CONVEYING LIFE ESTATE WITH REMAINDER TO HEIRS OF BENEFICIARY. Land conveyed to a trustee in trust for the use and benefit of a designated beneficiary during her natural life and after her decease to her heirs at law passes to the person who is her heir at law at the date of her death, and not to those who were her heirs at law at the time of the execution and delivery of the trust deed.

2. SAME—WHEN ADOPTED CHILD TAKES PROPERTY UPON DEATH OF BENEFICIARY. Where the *cestui que trust*, named in such trust deed, and her husband duly adopted, in 1883, pursuant to the provisions of the statute then in force (L. 1873, ch. 830), an infant as and for their lawful child, and thereafter they and such child sustained towards each other the mutually acknowledged relation of parent and child, and the *cestui que trust*, thereafter and subsequent to the death of her husband, died leaving her surviving no issue or descendants of any issue, such adopted child is

her heir at law with the meaning of the deed of trust, and the property passes to such child rather than to the brothers of the deceased *cestui que trust*, who were her heirs at law at the time of the execution and delivery of the trust deed.

3. SAME — RIGHTS OF ADOPTED CHILD. Although the statute (L. 1873, ch. 830), under which such child was adopted, excluded adopted children from any right of inheritance, such child is entitled to the benefit of the statute (L. 1896, ch. 272, § 64, as amd. by L. 1897, ch. 408, § 64), enacted subsequent to the adoption, conferring the right of inheritance upon adopted children, and thereby became the heir at law of the *cestui que trust* and upon her death entitled to the trust property under the deed of trust; the brothers of the *cestui que trust*, who were living at the time of the execution of the trust deed, in 1853, and at the time of her death, did not by such relationship acquire any vested right during the life of their sister to the continuance of such heirship since the legislature had the power to change this right and provide for a different line of inheritance.

4. SAME — CONSTRUCTION OF STATUTES RELATING TO RIGHTS OF INHERITANCE OF ADOPTED CHILD. The provisions of the statute (L. 1896, ch. 272, § 60) that "Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June 25, 1873, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created," have no application to the trust in question, although the trust deed was executed and delivered in 1853. It was not created by will or any testamentary provision, and is not a trust within the meaning of such statute; the only trust created was for the use and benefit of the *cestui que trust* named in the trust deed during her natural life, and after her decease to her heirs at law; the purpose of the trust and the functions of the trustee were all accomplished and discharged when the *cestui que trust* died, and after that event the property passed without the aid of any trust to her heirs; that is, to the persons whom the law should designate as her heirs when the time arrived.

Gilliam v. Guaranty Trust Co., 111 App. Div. 656, affirmed.

(Argued June 4, 1906; decided October 2, 1906.)

APPEAL, by permission, from an interlocutory judgment entered March 12, 1906, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed a judgment of Special Term sustaining a demurrer to the complaint and overruled such demurrer.

The following question was certified: "Does the complaint herein state facts sufficient to constitute a cause of action?"

N. Y. Rep.]

Points of counsel.

The nature of the action and the facts, so far as material, are stated in the opinion.

John D. Henderson and *Charles Bell* for appellants. The complaint does not state facts sufficient to constitute a cause of action, and the demurrer was properly sustained by the Special Term. (*Noyes v. Blakeman*, 6 N. Y. 567; *Marx v. McGlynn*, 88 N. Y. 376; *Embury v. Sheldon*, 68 N. Y. 234.) Defendants Dyett took a vested remainder. (*Smith v. Allen*, 161 N. Y. 483; *Hearst v. Horton*, 1 Den. 165; *Campbell v. Rawdon*, 18 N. Y. 419; *Heath v. Hewitt*, 127 N. Y. 167; *Moore v. Littel*, 41 N. Y. 66; *Embury v. Sheldon*, 68 N. Y. 233; *Watkins v. Reynolds*, 123 N. Y. 216; *Miller v. Wright*, 109 N. Y. 200; *Hersey v. Simpson*, 154 N. Y. 500.) There are no words in the deed which can be construed to give any power of appointment. (*Middleworth v. Ordway*, 49 Misc. Rep. 81; *Matter of Thorne*, 155 N. Y. 141; *Dodin v. Dodin*, 16 App. Div. 42; *Von Beck v. Thomsen*, 44 App. Div. 380; *Simmons v. Burrill*, 59 N. Y. S. R. 554; *Hersey v. Simpson*, 154 N. Y. 500.) The plaintiff has no right of inheritance. (L. 1873, ch. 830; L. 1887, ch. 703.) If the vesting of this estate was postponed until the death of the life tenant then this plaintiff cannot take this estate. (*Tillman v. Davis*, 95 N. Y. 24; *Keteltas v. Keteltus*, 72 N. Y. 315; *Murdock v. Ward*, 67 N. Y. 387; *Luce v. Dunham*, 69 N. Y. 36; *Cushman v. Horton*, 59 N. Y. 115.)

John R. Abney and *John M. Harrington* for respondent. The conditions and law existing at the date of the death of Frances J. Thomas (formerly Dyett) are the conditions and law under which the rights of the parties should be determined. (*Dodin v. Dodin*, 16 App. Div. 42; 162 N. Y. 635; *Kemp v. N. Y. P. Exchange*, 34 App. Div. 175; *Von Beck v. Thomsen*, 44 App. Div. 373; 167 N. Y. 601; *Theobald v. Smith*, 103 App. Div. 200; Broom's Legal Maxims [8th Am. ed.] *522; *Heath v. Hewitt*, 127 N. Y. 166; *Dougherty v.*

Thompson, 167 N. Y. 472; *Paget v. Melcher*, 26 App. Div. 12; 156 N. Y. 399.) The trust ceased on the death of the *cestui que trust*. (*Rhodes v. Caswell*, 41 App. Div. 229; *Losey v. Stanley*, 147 N. Y. 560; *Stevenson v. Lesley*, 70 N. Y. 512.) Plaintiff's intestate, the adopted daughter of Frances J. Thomas (formerly Dyett), was her "heir at law" within the meaning of the deed of 1853. (L. 1896, ch. 272, § 60; L. 1897, ch. 408; *Dodin v. Dodin*, 16 App. Div. 42; 162 N. Y. 635; *Kemp v. N. Y. P. Exchange*, 34 App. Div. 175; *Von Beck v. Thomsen*, 44 App. Div. 373; 167 N. Y. 601; *Theobald v. Smith*, 103 App. Div. 200; *Bisson v. W. S. R. R. Co.*, 143 N. Y. 125; *Cushman v. Horton*, 59 N. Y. 149; *Matter of Baer*, 147 N. Y. 348; *Rudd v. Cornell*, 171 N. Y. 114; *Matter of Smith*, 131 N. Y. 239; *Teed v. Morton*, 60 N. Y. 502; *Stevenson v. Lesley*, 70 N. Y. 512.) The expectancy or possibility of taking the property at the death of the life beneficiary was all that could be claimed in behalf of the appellants. This possibility was very contingent in its nature. (*Moore v. Littel*, 41 N. Y. 66; *Jackson v. Littell*, 56 N. Y. 108; *House v. McCormick*, 57 N. Y. 310; *Dougherty v. Thompson*, 167 N. Y. 472; *House v. Jackson*, 50 N. Y. 161; *Paget v. Melcher*, 156 N. Y. 399; *Hennessy v. Patterson*, 85 N. Y. 91; *Matter of Baer*, 147 N. Y. 348; *McGillis v. McGillis*, 154 N. Y. 532; 11 App. Div. 359.) The legislature had full power to and did modify the Statute of Descent so as to qualify the plaintiff's intestate as an heir at law of the life beneficiary, and the appellants had no vested right that was affected by such legislation; there can be no vested right to the continued existence of a general law. (*Dodin v. Dodin*, 16 App. Div. 42; *Kemp v. N. Y. P. Exchange*, 34 App. Div. 175; *Moore v. City of New York*, 8 N. Y. 110; *Randall v. Kreiger*, 23 Wall. 137; *McNeir v. McNeir*, 142 Ill. 388; Cooley on Const. Lim. [7th ed.] 511; *Heath v. Hewitt*, 127 N. Y. 166; *De Mill v. Lockwood*, 3 Blatchf. 56; *Kohler's Estate*, 199 Penn. St. 455; *Johnson's Appeal*, 88 Penn. St. 346; *McGillis v. McGillis*, 11 App. Div. 359.)

HISCOCK, J. This action was brought by plaintiff for the purpose of having it adjudged that she, an adopted daughter, was the heir at law of one Frances J. Thomas, and as such entitled to take certain real estate under a deed which conveyed said real estate to the use of Mrs. Thomas during life and after her decease to her heirs at law. The appellants are brothers of Mrs. Thomas, and by their demurrer to the complaint, which fully sets out the facts, challenge the right of plaintiff to take as an heir at law under the circumstances of this case.

I am led to the conclusion that plaintiff's claim is well founded, and that the judgment appealed from should be affirmed.

In 1853 Eliza Hunt conveyed land to one Findlay as trustee of Frances J. Dyett (afterwards Thomas) "in trust for the use and benefit of said Frances J. Dyett during her natural life and after her decease to her heirs at law, except that the said party of the first part does hereby expressly authorize and empower the said party of the second part as such trustee as aforesaid * * * to sell and convey said lands and premises * * * and the money or proceeds of said sale to be invested as soon as conveniently may be in other real estate in the name of the party of the second part but for the use of said Frances during her life and after her decease to her heirs at law, and if the sale of said lands should be made, the money or proceeds of said sale shall until re-invested again be considered as land and held in trust for the benefit of said Frances during her life and after her decease to her heirs at law." The defendant trust company has been appointed trustee in the place of said Findlay.

In December, 1883, said Frances J. Dyett, who had been intermarried with Francis H. Thomas, and her said husband, pursuant to the provisions of chapter 830 of the Laws of 1873, entitled "An act to legalize the adoption of minor children by adult persons," duly adopted plaintiff, who then was an infant, as and for their own lawful child, and thereafter said persons so adopting and the plaintiff herein sustained towards

each other the mutually acknowledged relation of parent and child.

The husband died in the year 1888, and Mrs. Thomas died February 24, 1905, leaving her surviving no issue or descendants thereof.

At the time the deed was executed, and at the time Mrs. Thomas died, except for plaintiff, appellants, her brothers, were her sole heirs at law and next of kin, upon the assumption that their father was dead.

There appears to have been at the date of the death of Mrs. Thomas some accumulation of personal property as the result of the trust in her favor, and no question is made by the appellants that such personal property should pass to the plaintiff. The only question arises with reference to the inheritance of the real estate.

The appellants' demurrer, which in effect denies plaintiff's right to take said real estate under the provisions of the deed, rests upon two distinct propositions.

In the first place, they urge that they, being the only heirs at law of Mrs. Thomas when the deed was executed, took a vested right to the remainder in the real estate upon her death, which could not be defeated by the subsequent adoption of the plaintiff. And, secondly, they insist that whether this first proposition be maintained or not, the plaintiff, under the statutes defining the rights of inheritance of adopted children, was not an heir at law who could take the real estate. I shall consider these propositions in the order stated.

The first one may be somewhat briefly disposed of. I do not regard it essential to consider in detail the arguments which have been addressed to us for the purpose of determining whether the rights of appellants under the clause of final disposition in the deed at the time of its execution were in the nature of a contingent remainder or of a vested remainder, which would be divested by death before the death of the life beneficiary or which would open to admit other heirs arising before that event. Whatever disagreement there might be about the technical definition to be given to appellants' posi-

N. Y. Rep.]

Opinion of the Court, per HISCOCK, J.

tion as the only heirs of law of Mrs. Dyett when the deed was executed, I regard the law as well settled which, so far as concerns the practical question in this case, governs the construction of the clause of remainder and fixes the time as of which the heirs at law under it are to be ascertained. The general rule applicable to the facts here presented is well established that when property at a future date is to pass to a certain class of persons it will be distributed amongst the persons who compose such class at the date of distribution. (*Paget v. Melcher*, 26 App. Div. 12, 18; *affd.*, 156 N. Y. 399; *Matter of Baer*, 147 N. Y. 348; *Bisson v. W. S. R. R. Co.*, 143 N. Y. 125; *McGillis v. McGillis*, 11 App. Div. 359.)

Therefore, whatever may have been the legal situation of the appellants at the time when the conveyance was made, as defined in terms of legal phraseology, if before the death of Mrs. Thomas other persons rather than they had become the heirs at law, such latter persons are to be regarded as answering the requirements and taking the benefits of the grant.

It is conceded, as I understand it, by the learned counsel for the appellants that if the life beneficiary had left her surviving a natural child such child would have been her heir at law to the exclusion of the appellants and would have taken the real estate, but it is insisted that Mrs. Thomas could not by the artificial process of adoption create an heir who would divert the course of title of the real estate from the persons who were the natural heirs at law. And we are thus brought to the consideration of the second question above outlined, whether plaintiff was an heir at law for the purpose of taking the real estate in question. This involves an examination of the statutes relating to the rights of adopted children.

The act of 1873 under which plaintiff was adopted excluded her from any right of inheritance. After other enactments upon the subject which are immaterial here, chapter 272 of the Laws of 1896 (Domestic Relations Law) was adopted which at the date of death of Mrs. Thomas provided (section 60): "Nothing in this article in regard to an adopted child inheriting from the foster parent, applies to any will, devise

or trust made or created before June 25, 1873, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts, or devises in wills so made or created."

Section 64 of said act and article, as amended by chapter 408, Laws of 1897, provided that the adopted child should take the name of the foster parent, and that "the foster parent or parents and the minor sustain towards each other the legal relation of parent and child and have all the rights, and are subject to all the duties of that relation, including the right of inheritance from each other * * * and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over of real and personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen." These are the provisions which were in force at the time plaintiff's rights of inheritance accrued, if at all, and by them we are to test and measure such rights.

It is too well established to require any discussion that the relationship of appellants to Mrs. Thomas which originally made them her heirs at law, did not confer any vested right during the life of the sister to the continuance of such heirship, but that the legislature had the power to change this and provide for a different line of inheritance; also, that a child adopted under the provisions of the act of 1873 giving no right of inheritance is entitled to the benefit of the statute enacted subsequently to the adoption conferring such right. (*Dodin v. Dodin*, 16 App. Div. 42; *Theobald v. Smith*, 103 App. Div. 200.)

The only query is whether the statutes in force at the time when it became necessary to determine the identity of the heirs at law of Mrs. Thomas did or did not make plaintiff one of those heirs.

We set out upon the inquiry confronted and governed by the general provision above quoted, that an adopted child is clothed with the right of inheritance from its foster parent. This right not only extends to it personally, but through it to its heirs and next of kin. The commanding force of the statute secures to it in these respects the same rights which would be conferred by natural and blood relationship, except as those rights are limited by certain qualifications and exceptions. The plaintiff, therefore, can justify her claim to inheritance under the general rule, unless she can be brought fairly within the exceptions or qualifications of which, as the only ones pertinent, quotation has already been made.

It seems easy to determine that the facts of this case do not bring her within that prohibition of section 64 which prevents an adopted child from defeating by inheritance the passing and limitation over of property dependent upon a foster parent "dying without heirs." The mere reading of the deed in question makes it as plain as discussion could that the present one is not a situation coming within the terms of this provision. I do not understand that it is claimed otherwise.

But reliance is placed by appellants upon the clause quoted from section 60, and while there may be more basis for discussion of the effects of this than of the one just considered, nevertheless, I do not think that a careful analysis and fair construction of this clause justifies the conclusion that it prohibited plaintiff from inheriting as heir of Mrs. Thomas.

The final sentence thereof, "That as to any such will, devise or trust * * * (one made or created before June 25, 1873) a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created," may be at once dismissed as inapplicable for the reason that the plaintiff was not adopted before the date in question. This leaves for consideration the provision that "Nothing in this article in regard to an adopted child inheriting from a foster parent applies to any will, devise or trust made or created before June 25, 1873, or alters, interferes with or changes

such will, devise or trust." The language employed is not altogether apt, and I suppose that its fair translation would be that the right of inheritance conferred upon an adopted child should not permit it to take under any will, devise or trust made or created before June 25, 1873, or to alter, interfere with or change the effect of such will, devise or trust. I do not discover that it has thus far been claimed by any one that the inheritance by plaintiff would be under or by virtue of any will or devise, or would alter, change or interfere with the provisions of any will or devise. The meaning of those terms is so well settled and so confined to a testamentary disposition of property that it would be quite violent to so extend their scope as to include a grant and conveyance by deed even though the latter in some respects may have answered the purpose of a last will and testament.

If it should be urged that there was no reason why the legislature prohibiting an adopted child from interfering by inheritance with wills and devises should not extend such prohibition to a deed largely answering the purpose of a will and devise, it must be answered that it was for the legislature to determine what they would and would not include in their enactments, and if through intention or even inadvertence they have fairly failed to provide for such a case as is presented here, we cannot supply such omission by any process of improper construction.

The more insistent argument has been based upon the prohibition of inheritance under or interference with a "trust" made or created before June 25, 1873.

I doubt if it would be claimed that the plaintiff's standing as an heir is undermined and destroyed by this provision if we give to the language its ordinary meaning and construe the statute and the deed as they have actually been written rather than to the end of accomplishing some particular result.

The only "trust" was created for the benefit of Mrs. Thomas (Dyett) during her life. The deed ran to the grantee "as trustee of Frances J. Dyett," and it was "in trust for

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

the use and benefit of the said Frances J. Dyett during her natural life," and after her decease to her heirs at law ; the trustee was permitted to do certain things as he should consider "for the best interests of the said Frances." The purpose of the trust and the functions of the trustee were all accomplished and discharged when Mrs. Thomas died, and after that event the property passed without the aid of any trust to her heirs.

No suggestion is made in the complaint or by the appellants that there will be any necessity even for a formal conveyance by the trustee. The heirs at law will take the legal title under the remainder clause of the deed after the trust has been fully executed, and the succession by them to the title will be as independent of the trust as if provided for in a separate instrument. Under those circumstances it does not seem to be the natural construction to say that the plaintiff will take under or in any manner alter, change or interfere with the only trust which was created.

But, in substance, it was reasoned in the dissenting opinion of the learned justice in the Appellate Division and has been argued upon this appeal that when the grantor provided for remainder to the heirs at law of Mrs. Thomas he contemplated heirs of the blood and that, therefore, it would be unjust to allow her to create one by legal proceedings, and that we ought to seek out some process of reasoning or construction which will avoid violation of the grantor's intentions. And the suggestion is made that we may construe the word "trust" in the statute as broad enough to include the deed in part devoted to creating the trust, and regard the entire conveyance as impressed with the nature of a trust because it is in part devoted to creating one. In other words, it is urged that the court, if possible, ought somewhat to adapt its interpretation of the deed and statute to the end to be reached, and that end is the prevention of a creation by adoption of an heir who will displace natural heirs, and disappoint what is assumed to have been the expectations of the grantor.

I cannot concede that any sufficient reason exists why we should depart from the natural interpretation of the statute,

as I have attempted to outline it, and adopt the latter one as a matter of policy even if we could. In the first place since the legislature has deemed it wise as a matter of general policy to authorize the adoption of children and to confer upon them in general the rights as well as obligations of natural children, we should be careful not unreasonably to limit those rights for the purpose in some given case of carrying out the assumed intention of some individual. But further than this, the argument that the intention of the grantor will be violated by allowing plaintiff to inherit, while superficially a potential one, does not stand the test of careful analysis. Of course the donor when he executed his deed could not apprehend that at a given date many years hence statutes would be enacted providing for the adoption of children and conferring upon them the right of inheritance. But, upon the other hand, he must be assumed to have known that the lines of inheritance were governed by statute and at any time could be changed. He was evidently interested in providing for the life beneficiary in a certain definite manner down to the moment of her death, and did so. But after that apparently he had no desire to limit the succession to his real estate to any particular definite line of persons. He directed generally that it should go to her heirs at law; that is, to the persons whom the law should designate as her heirs when the time arrived. He threw the responsibility of selection upon the law. He took his chances upon the happening of just what did happen. There is nothing to show that he was related by blood to Miss Dyett and her heirs, and if the statute gave her the right and she desired in default of children to adopt plaintiff, and by force of law establish in all other respects the same relationship of parent and child which natural birth would have created, I am not able to think that the passage of the grantor's real estate to such child will be any serious violation of his desire and direction that it should go to her heirs at law.

As was said in *Kohler's Estate* (199 Pa. St. 455) with reference to an adopted child: "The will of John Kohler, father of the *cestui que trust*, was written thirty-six years

N. Y. Rep.]

Statement of case.

before the decree of adoption, and that event, therefore, was not reasonably within the contemplation of the testator. But, as he gave the estate to those persons to whom the law would give it in case of intestacy, he cannot be said to have had any particular class of heirs or next of kin in view, and he committed the question of determining who should take it to the law itself."

The judgment should be affirmed, with costs. Question certified answered in the affirmative, with leave to defendants to withdraw demurrer and answer within 20 days on payment of costs.

GRAY, EDWARD T. BARTLETT and CHASE, JJ., concur; CULLEN, Ch. J., O'BRIEN and WERNER, JJ., dissent.

Judgment affirmed.

LOUISE JOHNSON, Respondent, v. THE CITY OF NEW YORK
et al., Appellants.

1. HIGHWAY — SPEED CONTEST BY AUTOMOBILES ON PUBLIC HIGHWAY — WHEN SPECTATOR INJURED THEREBY CANNOT RECOVER BECAUSE CONTEST, AND USE OF HIGHWAY, WAS ILLEGAL. While the use of a certain public highway within the city of New York as a racecourse for automobiles competing against time, and the holding of an automobile race thereon by certain specified persons, which was authorized by a special ordinance, was illegal not only because the ordinance was invalid as a regulation of the speed of automobiles but because it permitted the use of a public highway for a private purpose and it operated as a participation of the city in the commission of the unlawful act, yet, where a person came to such highway at the time of the race, not as a traveler or casual spectator traveling in the vicinity, but for the express purpose of witnessing the race, knowing it was to be a contest and that the automobiles would be driven at the greatest possible speed, and, while witnessing the race, was injured by an automobile, deflected from the course, running at high speed, it is reversible error, upon the trial of an action brought by such injured person against the city and the persons conducting the race, to direct a verdict for the plaintiff upon the ground that the speed contest, and the use of the highway for that purpose, was illegal and a nuisance and submit to the jury only the question of damages.

2. SAME — LIABILITY OF DEFENDANTS DEPENDENT UPON QUESTION OF FACT WHETHER THEY WERE GUILTY OF NEGLIGENCE OR OF COMMITTING A NUISANCE IN THE MANNER OF CONDUCTING THE RACE. The fact that the race and the use of the highway for that purpose were illegal

does not render the city or the parties participating in the race liable to the plaintiff, regardless of any element of negligence or other misconduct. As between the plaintiff and these defendants the legality or illegality of the exhibition given and witnessed so far as that illegality depends on the obstruction and appropriation of the highway was not the material factor. It did not create a liability against the defendants if they were at fault in the conduct of the race in no other respect. It does not preclude a recovery by the plaintiff if the injury to her was caused by the misconduct or fault of the defendants. Whether the contest as conducted was in fact a nuisance, whether the defendants, or any of them, were guilty of negligence in the management of the race and the contributory negligence, if any, on the part of the plaintiff, were all questions of fact which the trial court should have submitted to the jury for determination.

Johnson v. City of New York, 109 App. Div. 821, reversed.

(Argued May 17, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 9, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial.

The nature of the action and the facts so, far as material, are stated in the opinion.

John J. Delany, Corporation Counsel (James D. Bell of counsel), for City of New York, appellant. The action of the board of aldermen in adopting the resolution or ordinance under which a portion of the Southside boulevard was set aside for the automobile speed trials did not create a nuisance *per se*, and the court erred in declining to submit any question but that of damages to the jury. (*Flynn v. Taylor*, 127 N. Y. 596; *Bybee v. State*, 94 Ind. 443; *Landau v. City of New York*, 180 N. Y. 48; *Scanlon v. Wedger*, 156 Mass. 462; *Frost v. Josselyn*, 180 Mass. 389; *Crowley v. R. F. Co.*, 95 App. Div. 13; *Gillis v. Penn. R. R. Co.*, 59 Penn. St. 129; *McCarthy v. Vil. of Munising*, 99 N. W. Rep. 865; *Laidlaw v. Sage*, 158 N. Y. 99; *Meeker v. Smith*, 84 App. Div. 111; *Roedecker v. M. S. R. Co.*, 87 App. Div. 227; *Seifter v. B. H. R. R. Co.*, 169 N. Y. 254; *Hoffman v. King*, 160 N. Y. 618.)

Charles F. Brown and *W. W. Niles* for Automobile Club of America, appellant. The judgment appealed from cannot be sustained upon the ruling of the trial judge that speeding of automobiles on the Southside boulevard on the day of the accident was an illegal act and constituted a public nuisance. Assuming that instruction to have been correct, it was essential to the plaintiff's right to recover that the illegal act which constituted the nuisance was the proximate cause of her injuries. That question was one of fact which the court refused to submit to the jury. (*Irvine v. Wood*, 51 N. Y. 224; *Laidlaw v. Sage*, 158 N. Y. 98; *Seifter v. B. H. R. R. Co.*, 169 N. Y. 254; *Roedecker v. M. S. R. Co.*, 87 App. Div. 227; *Schoepflin v. Coffey*, 162 N. Y. 12; *Hoffman v. King*, 160 N. Y. 618; *Thomas v. Winchester*, 6 N. Y. 397; *Coughtry v. G. W. Co.*, 56 N. Y. 124; *Devlin v. Smith*, 89 N. Y. 470; *Cohen v. Mayor, etc.*, 113 N. Y. 537.) The plaintiff having gone from her home to the boulevard for the sole purpose of "seeing the races," she must be deemed to have consented to the use and appropriation of the boulevard for the purpose of the contest. So far as she was concerned, the running of automobiles at a speed in excess of eight miles an hour cannot, therefore, be held to have been a nuisance, and she cannot recover for her injuries upon any ground except that of negligence. (*Scanlon v. Wedger*, 156 Mass. 462; *Crowley v. R. F. W. Co.*, 183 N. Y. 353; *Ochsenbein v. Shapley*, 85 N. Y. 215; *Thomp. on Neg.* § 791.) The court erred in ruling that the use of the highway for the purpose of the contest, and speeding automobiles thereon as authorized by the city, was illegal and a nuisance *per se*. (Penal Code, § 385; 3 Black. Comm. 215; 1 Russell on Crimes, 318; *Peckham v. Henderson*, 27 Barb. 210; *Landau v. City of New York*, 180 N. Y. 48.)

John G. Milburn for Albert R. Shattuck et al., appellants. The plaintiff, by reason of her voluntary attendance, is not in a position to raise the question that the speed trials were illegal or a nuisance, and has no cause of action excepting for

negligence. (*Scanlon v. Wedger*, 156 Mass. 462; *Frost v. Jocelyn*, 180 Mass. 389; *Crowley v. R. F. Co.*, 183 N. Y. 355; *Knisley v. Pratt*, 148 N. Y. 372.) Even if the trials were a violation of section 666 of the Penal Code, liability to plaintiff for the accident does not follow as a matter of course. (*Brown v. R. R. Co.*, 22 N. Y. 191; *Massoth v. D., L. & W. R. R. Co.*, 64 N. Y. 531; *Knuffle v. K. I. Co.*, 84 N. Y. 488; *Hanlon v. Ry. Co.*, 129 Mass. 310; *G. T. Ry. Co. v. Ives*, 144 U. S. 418; *Graham v. M. R. R. Co.*, 149 N. Y. 341; *Donnelly v. City of Rochester*, 166 N. Y. 319; *Marino v. Lehmaier*, 173 N. Y. 530.) It was error to hold that these speed trials were a nuisance as a matter of law. (Penal Code, § 385; *Heeg v. Licht*, 80 N. Y. 579; *Speir v. City of Brooklyn*, 139 N. Y. 6; *Landau v. City of New York*, 180 N. Y. 48; *Crowley v. R. F. Co.*, 183 N. Y. 353.)

Stillman F. Kneeland for respondent. The court was warranted in directing a verdict on the ground that the unlimited speeding of that particular machine on that particular route in the presence of a great crowd was a nuisance *per se*. (*Carleton v. Rugg*, 5 L. R. A. 193; *Ricker v. McDonald*, 89 App. Div. 300; *Callahan v. Gilmore*, 107 N. Y. 360; *Negus v. City of Brooklyn*, 10 Abb. [N. C.] 180; *Fanning v. Osborne*, 102 N. Y. 441; *Beekman v. T. A. R. R. Co.*, 153 N. Y. 144; *McComber v. Michaels*, 22 Am. Rep. 522; *Bennett v. Lovell*, 34 Am. Rep. 628; *N. C. C. R. Co. v. Town of Lakeview*, 44 Am. Rep. 788; *Stanley v. City of Davenport*, 54 Iowa, 463.) The court was warranted in directing a verdict on the ground that the admitted facts constituted in law a trespass. (*Castle v. Duryee*, 2 Keyes, 169; *Hay v. Cohoes Co.*, 2 N. Y. 159; *St. Peter v. Denison*, 58 N. Y. 416; *Sullivan v. Dunham*, 161 N. Y. 290.) The defendants were liable on the principle of negligence *per se* or statutory negligence. (1 Thomp. on Neg. § 9; *Tobey v. B., etc., R. Co.*, 94 Iowa, 256; *Siemers v. Eisen*, 54 Cal. 418; *Tucker v. Ill., etc., R. Co.*, 42 La. Ann. 114; *St. L., etc., R. Co. v. Huggins*, 20 Ill. App. 639;

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

I., etc., R. Co. v. Barnhart, 115 Ind. 391; 13 West. Rep. 431; *Clements v. L. E. L. Co.*, 44 La. Ann. 692; *Osborne v. McMasters*, 40 Minn. 103; *D., etc., R. Co. v. Robbins*, 2 Colo. App. 313; *C., etc., R. Co., v. Des Lauriers*, 40 Ill. App. 654.) The defendants having acted in violation of the statute are liable in tort for the consequences of their wrongful acts without regard to the question of nuisance or actual negligence. (*Haegi v. P. & N. Y. S. S. Co.*, 54 How. Pr. 145; *Jetter v. N. Y. & N. H. R. R. Co.*, 2 Keyes, 154; *Massoth v. D. & H. C. Co.*, 64 N. Y. 532; *Donnegan v. Erhardt*, 119 N. Y. 468; *Willy v. Mulledy*, 78 N. Y. 310; *Conklin v. Thompson*, 29 Barb. 218; *Creed v. Hartman*, 29 N. Y. 591; *Clifford v. Dam*, 81 N. Y. 52; *Congreve v. Smith*, 18 N. Y. 79.) As a question of law under the undisputed facts in the case the joint acts of the automobile club and of the city constituted the proximate cause of the injuries sustained by the plaintiff. (*Freeman v. M. M. A. Assn.*, 156 Mass. 351; *Thomp. on Negligence*, § 48; *Gibney v. State*, 137 N. Y. 1; *Sheridan v. B. C. & N. R. R. Co.*, 36 N. Y. 39.) The legal status of a spectator does not differ in principle from that of an ordinary traveler. (*Thomp. on Neg.* [2d ed.] § 792; *Fisk v. Waite*, 104 Mass. 71; *Cohen v. Peabody*, 155 Mass. 104; *Castle v. Durjee*, 2 Keyes, 169; *Bradly v. Andrews*, 51 Vt. 530; *McGuire v. Spence*, 91 N. Y. 303.)

CULLEN, Ch. J. This action was brought to recover damages for personal injuries suffered by the plaintiff by being struck by an automobile while witnessing a speed test or race of the machines in a public highway in the borough of Richmond, city of New York. The highway, which was in an outlying part of the city and known as the Southside boulevard, had been used as a resort for fast driving for a number of years. The race or speed contest was conducted by sending the automobiles, one at a time, over a measured distance on the highway. It was held under the assumed authority of the following resolution adopted by the

board of aldermen: "*Resolved*, That upon the recommendation of the Local Board, First District, Borough of Richmond, permission be and the same hereby is given to the Automobile Club of America to conduct speed trials for automobiles on the Southside Boulevard, in the Fourth Ward of the Borough of Richmond, on Saturday, May 31st, 1902, between the hours of 11 o'clock A. M. and 4 o'clock P. M., or in case the day be stormy, on the first clear week day thereafter between the same hours, and that during said hours on said day a speed of greater than eight miles per hour may be attained, to which end any and all ordinances regulating the speed of vehicles is hereby suspended, such suspension to continue, however, only for the day and place on which the privilege herein mentioned and conveyed is exercised; and provided, further, that the said Automobile Club of America furnish all proper police protection over that part of the Southside Boulevard over which the said trials are to be conducted." The plaintiff was present as a spectator. She came from her residence about five miles away in company with her husband and others, as she said, "to see the races." She first witnessed the race from the highway, but finding a better view could be obtained, she passed from the highway into an adjacent clump of woods and there remained. Many automobiles went over the course without mishap. Finally, one machine, moving at the rate of about a mile a minute, by some mischance was deflected from the road into the woods and struck and injured the plaintiff. At the conclusion of the evidence the learned trial judge, over the objection and exception of the several defendants, directed a verdict against them all on the ground that the speed contest was unlawful and a nuisance, and submitted to the jury only the question of damages. That judgment has been affirmed by the Appellate Division, and from the judgment of the Appellate Division this appeal is taken.

It may be conceded that the action of the city in authorizing the use of a public highway as a racecourse for automobiles competing against time was illegal, and that the act of

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

the other defendants in holding the race under that permission was equally illegal. Under the law, at the time of this accident, any person driving or operating an automobile or motor vehicle upon any highway within any city or incorporated village at a greater rate of speed than eight miles an hour, "except where a greater rate of speed is permitted by the ordinance of the city," was guilty of a misdemeanor. (Laws 1902, ch. 266.) The special ordinance under which the race took place was passed by the common council on April 15th, 1902. That this ordinance, which did not assume to authorize the operation of automobiles generally at a greater rate than that prescribed in the statute, and permitted only certain specified persons to use the highway as a racecourse on a particular occasion, was not only invalid as a regulation of the speed of automobiles, but also operated as a participation by the city in the commission of the unlawful act, is settled by the recent decision of this court in *Lanlan v. City of New York* (180 N. Y. 48). In that case the plaintiff was injured by a discharge of fireworks in a city street. There had been a general ordinance passed by the municipality which forbade the discharge of fireworks in the streets. A short time prior to the accident the common council passed a resolution suspending the ordinance so far as it might apply to the meetings or parades of political parties during the election campaign of 1902, the suspension to continue till November 10th of that year. It was conceded by this court that the municipality would not have been liable for failure to enact general ordinances restricting or forbidding the discharge of fireworks, and it was contended that the action of the common council was a mere repeal *pro tanto* of the previous ordinances, a repeal for which the city could not be held liable any more than for a failure to pass the original ordinance. This court took a different view, and held that the resolution authorizing the discharge of fireworks at political meetings and parades was not an exercise of the power possessed by the local authorities to regulate the use and discharge of fireworks, but merely an unlawful special

license or permission to individuals. The action of the defendants was also illegal in other respects than those relating to the rate of speed. It assumed to grant to individuals the right to appropriate the highway for a private purpose, to wit, that of a racecourse, to the exclusion of the public. Authority reposed in the common council by the charter (sec. 50) "to regulate the use of streets and sidewalks by foot passengers, animals and vehicles, to regulate the speed at which vehicles are propelled in the streets," etc., gave no power to divert the highway from public to private use. The authority was to regulate public travel, not to exclude the public. Of course, in the congested condition of many of the streets of the city of New York restrictions, possibly of a somewhat arbitrary character, are necessary to secure public passage along the highway; otherwise intolerable confusion would exist and the streets become blocked so that travelers could move in no direction. Such regulations are within the power of the municipal authorities. So also it may be that the right of the municipal authorities to allow, at certain seasons of the year and on certain streets where it can be safely done, the operation of vehicles at a greater speed than elsewhere permitted and the use of the street for sleighing or coasting, can be sustained. This it is unnecessary to determine. In those cases every member of the public has an equal right to share in the privileges granted in the street. There is no appropriation of it for a private use. The present case is radically different. The occupation of the highway was to be exclusive in the parties to whom the permission was granted. Therefore, the race or speed contest held by the defendants was an unlawful use and obstruction of the highway and *per se* a nuisance. (Penal Code, sec. 385, sub. 3.)

But granting that the action of the defendants in the use of the highway was illegal, the question remains, was it illegal against the plaintiff so as to render the parties participating therein liable to her solely by reason of the illegality of their acts and regardless of any element of negligence or other misconduct. If the plaintiff had been a traveler on the highway

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

when she met with injury a very different question would be presented. Highways are constructed for public travel, and, as already said, the acts of the defendants were doubtless an illegal interference with the rights of the traveler. It may well be that for an injury to the traveler, or to the occupants of the lands adjacent to the highway, or even to a person who visited the scene of the race for the purpose of getting evidence against the defendants and prosecuting them for their unlawful acts, the defendants would have been absolutely liable regardless of the skill or care exercised. But the plaintiff was in no such situation. She was not even a casual spectator whose attention was drawn to the race while she was traveling in the vicinity. She went from her home, a distance of five miles from the scene of the race, expressly to witness it and to enjoy the pleasure that the contest offered. As to the elements which made the contest illegal she was aware of their existence. She knew it was to take place on a highway, and she knew it was to be a contest for speed, and that, therefore, the automobiles would be driven at the greatest speed of which they were capable. The learned Appellate Division has said: "It is possible that a different view might be taken had it appeared that the plaintiff knew or had any reason to know of the unlawful nature of the contest. There is, however, nothing in the case tending to indicate that she was aware that they were not being conducted under the operation and sanction of a general ordinance or by virtue of a legal and valid permit." It is entirely possible that as a matter of fact the plaintiff did not know that the race on the highway was illegal, but it was illegal not from any want of permit, but because there was no statutory power to grant a permit to use the highway for a private purpose. The plaintiff, like every other person, is chargeable with knowledge of law, however ignorant in fact she may have been of it. But it is equally probable that the defendants thought that the race was legal. No distinction can be drawn between the parties in this respect. We are at a loss, moreover, to see how the legality or illegality of the race affected a person in the

condition of the plaintiff. The danger she would encounter in witnessing the race would be exactly the same had there been a statute of the state which expressly authorized it. It does not lie in the mouth of the plaintiff to assert as a ground of liability the illegality of an act from which she sought to draw pleasure and enjoyment. It may be assumed that her mere presence at the race was not sufficient participation therein to render her liable to prosecution as one of the maintainers or abettors of the nuisance (Cooley on Torts, p. 127), though in the case of a prizefight, at common law, all spectators were equally guilty with the combatants of a breach of the peace. (*Rex v. Perkins*, 4 C. & P. 537; *R. v. Murphy*, 6 C. & P. 103; *R. v. Young*, 8 C. & P. 645.) The general maxim, *injuria non fit volenti* applies, and one cannot be heard to complain of an act in which he has participated, if not so far as to render him liable as a party to the offense or tort, at least to the extent of witnessing, encouraging it and seeking pleasure and enjoyment therefrom. Illustrations of this principle may readily be found. It is a misdemeanor to conduct a horse race within a mile of court when the court is in session; also to give a theatrical or operatic exhibition on Sunday. It seems to me absurd that persons obtaining admission and attending the prohibited race or opera and meeting injury there shall successfully assert the illegality of the exhibition as a ground for recovery. It might with just as much force be contended that the presence of the person injured at the illegal exhibition or spectacle precluded him from recovery against the parties by whose negligence or tort the injury had been occasioned. Such is the law in some jurisdictions, but not so in this state. In *Platz v. City of Cohoes* (89 N. Y. 219) the plaintiff while driving on Sunday for the purpose of pleasure was injured through a defect in one of the streets of the defendant. It was held that the fault of the plaintiff in driving on the Sabbath did not constitute a defense to the action and was not to be considered the proximate cause of the accident. We think the same principle applicable here. The acts of the defendant though

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

illegal were illegal as against the public and travelers on the highway, not as against the plaintiff. Had the defendants broken into and entered without permission upon private property and conducted the race thereon, doubtless they would have been absolutely liable for all injuries occasioned thereby to the owners or occupants of the land. But what bearing would the trespass have on the defendants' liability to spectators? On the other hand, the plaintiff, to get a better view of the race, entered and stood upon adjacent land. This probably was a trespass on her part. But equally it has no bearing on her right to recover if the defendants were guilty of negligence or other fault. As between the plaintiff and these defendants the legality or illegality of the exhibition given and witnessed, so far as that illegality depends on the obstruction and appropriation of the highway, was not the material factor. It did not create a liability against the defendants if they were at fault in the conduct of the race in no other respect. It does not preclude a recovery by the plaintiff if the injury to her was caused by the misconduct or fault of the defendants.

The view which we entertain is in accord with the law in the state of Massachusetts. In *Scanlon v. Wedger* (156 Mass. 462) it was held that a spectator at an exhibition of fireworks, held in a street, could recover only for negligence, the court saying: "If an ordinary traveler upon the highway had been injured different reasons would be applicable; but a voluntary spectator who is present merely for the purpose of witnessing the display must be held to consent to it, and he suffers no wrong if accidentally injured without negligence on the part of any one, although the show was unauthorized. He takes the risk." From this decision there was a strong dissent, but an examination of the dissenting opinion shows that it was directed rather to the question of negligence than to that of illegality. The case was followed in *Frost v. Josselyn* (180 Mass. 189). In Pennsylvania the law has been extended in this direction farther probably than would command our assent. In *Norristown v. Moyer* (67 Pa. St. 355) the charge

of the trial judge that loitering in the public highway would *per se* preclude a recovery from the fall of a falling pole seems to have been approved. In this state, where a boiler was being tested on the public highway, it was held that for a traveler to remain in the vicinity after being informed of the danger raised a question of contributory negligence to be determined by the jury. The cases relied on by the learned counsel for the respondent we think are not controlling. The decision in *Bradley v. Andrews* (51 Vt. 530) is directed to contributory negligence and assumed risks, not to illegality. In *Castle v. Duryee* (1 Abb. Ct. of App. Dec. 327), where the plaintiff was injured by a ball discharged from a gun during the exercises of a militia regiment, the recovery at Circuit was on the ground of negligence, a recovery which was upheld by this court. Judge DENIO in his opinion thought the recovery might also be sustained on the ground of trespass. The report shows that a majority of the court concurred in the decision. Whether the opinion was also concurred in does not appear. However that may be, Judge DENIO states that the plaintiff in that case was unaware that there was to be any discharge of firearms. Here the plaintiff knew that there was to be a test of speed of automobiles, and it was the high speed of the automobile that caused the injury. In *Guille v. Swan* (19 Johns. 381) it was held that a defendant who descended in a balloon upon the plaintiff's garden, whereby a great crowd of people broke through the fences and injured his vegetables and flowers, was liable for the consequences of his act, although he might not have invited the crowd. That case would be in point if it had been held that the defendant was also liable to one of the crowd who had been injured while entering into the garden without invitation. In *McGuire v. Spence* (91 N. Y. 303) it was held that the fact that a child was playing in the street did not prevent her from recovering for injuries occasioned by falling into a dangerous and unguarded area which the defendant had left in the street. This is doubtless authority for the right of the child to play in the street, but

it is not authority for the proposition that the defendant would have been liable had the child gone to play with the area by jumping into it and clambering out of it. It must be distinctly borne in mind in this case that as already said the plaintiff was not a casual spectator, whose attention might naturally be drawn to any remarkable occurrence on the highway and thereby loiter for some short period without losing her rights as a traveler, but one who went to the place expressly to see the exhibition.

The learned counsel for the respondent has argued at length that the character of the road, the curve in it, the nature of its pavement and similar matters rendered it dangerous and improper to conduct a contest by automobiles, and that considering the number of persons naturally attracted to such a spectacle the contest was so dangerous as to constitute a public nuisance within the definition of the Penal Code. (Penal Code, § 385, sub. 4.) Whether the contest as conducted was in fact a nuisance, whether the defendants, or any of them, were guilty of negligence in the management of the race and the contributory negligence, if any, on the part of the plaintiff, were all questions of fact which the trial court should have submitted to the jury for determination. (*McDonald v. Met. St. Ry. Co.*, 167 N. Y. 66.)

For these reasons the judgment of the courts below must be reversed and a new trial had, costs to abide the event.

EDWARD T. BARTLETT, HAIGHT, HISCOCK and CHASE, JJ., concur; GRAY and O'BRIEN, JJ., absent.

Judgment reversed, etc.

THEODORE TEWES, Respondent, v. NORTH GERMAN LLOYD STEAMSHIP COMPANY, Appellant.

COMMON CARRIER—STIPULATION IN OCEAN STEAMSHIP TICKET LIMITING LIABILITY FOR LOSS OF BAGGAGE—RECOVERY CONFINED TO STIPULATED AMOUNT. A stipulation in a passage ticket for an ocean voyage limiting the amount for which the carrier shall be liable for loss or injury to baggage, unless a declaration of value in excess of that sum is made,

covers a loss of goods occasioned by negligence, although there is no express provision exempting the carrier from liability for its own negligence; and in the absence of such declaration a recovery must be limited to the stipulated amount.

Tewes v. North German Lloyd S. S. Co., 104 App. Div. 619. reversed.

(Argued May 21, 1906; decided October 9, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 4, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

This action was brought to recover damages for the loss of plaintiff's baggage, consisting of a trunk containing wearing apparel, which loss it is alleged was caused by the defendant's negligence. The plaintiff is a resident of Long Island City, and on or about June 20th, 1900, purchased a ticket from the defendant entitling him to passage on the defendant's steamship *Grosser Kurfürst* from Hoboken, N. J., to Bremerhaven, Germany, to sail on June 28th following. This ticket, which in its general features is in the usual form, contained the following provisions: "It is mutually agreed that this ticket is issued by the North German Lloyd S. S. Co. and accepted by the passenger on the following conditions: * * * It is also agreed that neither the shipowner, nor the passage broker or agent, nor the ship, is in any way liable for loss of or injury to or delay in delivery of luggage or personal effects of the passengers beyond the amount of fifty dollars, unless the value of the same in excess of that sum be declared at or before the issue of this contract, or at or before the delivery of said luggage to the ship, and freight at current rates for every kind of property is paid thereon."

Two days before the day of sailing the plaintiff delivered his trunk to an expressman with directions to deliver it to the defendant. It was properly marked for delivery on board the steamship *Grosser Kurfürst*. One of the expressmen, called as a witness for the plaintiff, testified that he delivered the trunk at the place where he had been in the habit of deliver-

ing baggage for a number of years; that a watchman at the entrance to defendant's piers told him what pier to place it on and that he delivered it to whoever was there.

It appears that plaintiff's trunk was not placed on the steamer on which he took passage, but by some mistake it was left on a different pier of the defendant than that from which the *Grosser Kurfürst* sailed, where it was subsequently destroyed by a fire which occurred on June 30th and greatly damaged the defendant's piers.

The jury rendered a verdict in favor of the plaintiff for \$289.50, the value of the trunk and its contents, and the judgment entered on that verdict was unanimously affirmed at the Appellate Division.

Joseph Larocque, Jr., for appellant. The court erred in charging the jury that if the valuation clause in the passage contract "was not called to the attention of the plaintiffs, and they knew nothing about it, and by the exercise of reasonable attention would not have known it, in that case it will go for nothing, and the amount will be fixed at the full value which you find these things were worth." (*Steers v. L., N. Y. & P. S. S. Co.*, 57 N. Y. 1; *Wheeler v. O. S. N. Co.*, 72 Hun, 5; *Belger v. Dinsmore*, 51 N. Y. 166.) The fact that the agreement does not specifically refer to losses occasioned by defendant's negligence does not deprive the defendant of the benefit of the valuation clause. (*Condict v. G. T. R. Co.*, 54 N. Y. 500; *Hart v. P. R. R. Co.*, 112 U. S. 331; *The Kensington*, 183 U. S. 263; *Magnin v. Dinsmore*, 62 N. Y. 35; *Rowan v. W. F. & Co.*, 80 App. Div. 31; *N. G. L. S. S. Co. v. Heule*, 44 Fed. Rep. 100; *Bermel v. N. Y., N. H. & H. R. R. Co.*, 62 App. Div. 389; *Muser v. A. E. Co.*, 1 Fed. Rep. 382; *Riley v. Horne*, 5 Bing. 217; *Morrill v. N. E. Ry. Co.*, L. R. [1 Q. B. Div.] 302; *Hinton v. Dibbin*, 2 Ad. & El. [N. S.] 646.)

Lyman W. Redington for respondent. The charge as to the applicability of the clause limiting defendant's liability was correct. (*Belger v. Dinsmore*, 51 N. Y. 166; *Steers v.*

L., N. Y., etc., S. S. Co., 57 N. Y. 1; *Strong v. L. I. R. R. Co.*, 91 App. Div. 442; *Zimmer v. N. Y. C. & H. R. R. Co.*, 137 N. Y. 460; *Wheeler v. O. S. N. Co.*, 72 Hun, 5; *Blossom v. D. E. Co.*, 43 N. Y. 264; *Madon v. Sherard*, 73 N. Y. 329; *Grossman v. Dodd*, 63 Hun, 324; *Blossom v. Dodd*, 43 N. Y. 264; *Nicholas v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 370; *Bostwick v. Balt. & O. R. R. Co.* 45 N. Y. 717.) The liability clause cannot be asserted in the case at bar. By neglecting to put the trunk aboard, defendant subjected itself to the full liability of a common carrier. (*Ravson v. Holland*, 59 N. Y. 611; *London, etc., v. Rome, etc., R. R. Co.*, 144 N. Y. 200; *Condict v. G. T. R. R. Co.*, 54 N. Y. 500; *Magee v. C., etc., R. R. Co.*, 45 N. Y. 514; *Read v. Spaulding*, 30 N. Y. 630; *Sloman v. N. Y. C. R. R. Co.*, 30 N. Y. 564; *Hutchins v. P. R. R. Co.*, 181 N. Y. 186; *Magnin v. Dinsmore*, 3 J. & S. 182; *Magnin v. A. E. Co.*, 50 How. Pr. 457; *Westcott v. Fargo*, 61 N. Y. 542; 63 Barb. 349; 6 Lans. 319.)

WERNER, J. For the purposes of this appeal we must assume that plaintiff's trunk was properly delivered to the defendant. The verdict of the jury settled that question in plaintiff's favor, and the unanimous affirmance of the Appellate Division precludes us from examining the record to ascertain whether the verdict is supported by evidence. There are exceptions to the charge, however, the principal one of which relates to the provision in the passage ticket purchased by the plaintiff, purporting to limit defendant's liability for loss of baggage. After the learned trial court had charged the jury very briefly as to the delivery of the trunk, and as to the obligations which the defendant assumed if the fact of proper delivery were deemed to be established, the defendant's counsel requested the court to charge "that in no event can the defendant be liable for an amount exceeding \$50." In response to this request the court charged: "If this clause in this passage contract that the liability must be limited to \$50 to each person * * * if that clause was not called to the attention of the plaintiffs, and they knew nothing

about it, and by the exercise of reasonable attention would not have known it, in that case it will go for nothing, and the amount will be fixed at the full value which you find these things were worth." This charge was clearly in conflict with a number of well-settled cases which hold that there is a just and logical distinction between an ordinary railroad ticket, which may often be regarded as a mere token, and a passage ticket for an ocean voyage, the sale and purchase of which is usually conducted with such caution and deliberation as to invest the transaction with the elements of a contract, the terms of which the purchaser has ample opportunity to ascertain and understand. (*Steers v. Liverpool, N. Y. & P. S. S. Co.*, 57 N. Y. 1; *Belger v. Dinsmore*, 51 id. 166; *Wheeler v. Oceanic Steam Nav. Co.*, 72 Hun, 5; affirmed without opinion, 149 N. Y. 576.)

The error in the charge referred to was later discovered by the learned trial judge upon the hearing and consideration of a motion for a new trial, when he handed down an opinion which recognized the controlling force of the cases above cited, but denied the motion on the ground that the passage ticket or contract contained no provision absolving the defendant from liability for its own negligence, and that the finding of the jury necessarily established the defendant's negligence in failing to put the trunk aboard the steamer on which the plaintiff sailed pursuant to his contract. To support this conclusion a number of cases were cited which, we think, have no application to the case at bar, since they all relate to the common-law liability of common carriers, unaffected by special contract stipulations designed to limit the carrier's liability.

There is, however, a case (*Westcott v. Fargo*, 61 N. Y. 542) which seems to support the conclusion that a stipulation limiting the amount for which the carrier shall be liable does not cover a loss of goods occasioned by his negligence. That action was brought to recover the value of a bale of furs, which had been shipped through the defendant's express company and lost by its negligence. The receipt given to evidence the shipment contained the following limitation: "Nor

shall this company be liable for any loss or damage of any box, package or thing for over fifty dollars unless the true and just value thereof is herein stated." The value of the furs was not stated in the receipt and the defendant had no means of knowing the value or nature of the contents of the package. The plaintiff's agent had delivered the receipt containing the limitation to the defendant's agent, who signed and redelivered it to the former. In deciding that under such circumstances the plaintiff was entitled to recover, DWIGHT, C., writing for the Commission of Appeals, said: "The true question in this cause concerns the effect upon the parties of the stipulation that the defendant should 'not be liable for any loss or damage of any box, package or thing for over fifty dollars, unless the just and true value is herein stated.' It must be conceded that this stipulation, under the circumstances of this case, is a part of the contract, and is binding on the plaintiff. This was decided in *Belger v. Dinsmore* (51 N. Y. 166) and in *Steers v. Liverpool, N. Y. & P. Steamship Co.* (57 id. 1). * * * The result of these cases is, that it is lawful for a carrier to make such a contract as was entered into in the present case, and that he may, by clear and distinct expressions, relieve himself from losses occasioned by his own negligence." After thus clearly stating the rule, which has ever since been consistently followed, the learned commissioner concluded that the words of limitation in the receipt referred to were not so unambiguous as to exempt the carrier from liability for its own negligence, and he was of opinion that the case was controlled by the decision in *Magnin v. Dinsmore* (56 N. Y. 168), where it was held that although a common carrier may stipulate for his exemption from liability for losses through his negligence, his contract will not be construed to contain such an exemption unless it is so expressly agreed.

The decision in *Magnin v. Dinsmore* (*supra*) was handed down in March, 1874. The case of *Westcott v. Fargo* (*supra*) was decided by the Commission of Appeals in January, 1875. In the following May the *Magnin* case came to this court on a second appeal, where it was held that a stipulation limiting

N. Y. Rep.] Opinion of the Court, per WERNER, J.

the amount for which the carrier shall be liable was binding upon the shipper who had notice of the limitation and whose merchandise had been lost by the ordinary negligence of the carrier. In that case the merchandise consigned consisted of watches and watch keys. The shipper did not disclose their real value. The receipt given by the carrier provided that "if the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of or damage to the property aforesaid."

In reversing a judgment for the full value of the goods lost, this court said: "As has been stated, in the absence of agreement for a limited liability, it is the duty of the carrier to make all needful inquiry as to value. But when the shipper agrees with the carrier for a limited liability, he thereby expresses to the latter his estimate of the risk to be run and of the care needed and holds out the package to him as an ordinary article which he would have no objection to take as of course. The carrier is thereby put off his guard. The shipper might refuse to agree to a limited liability and demand generally carriage upon the common-law liability of the carrier; and then they deal at arms length and that would arouse the attention of the carrier; or at least would put upon him the duty of inquiry. But accepting carriage upon the terms of a limited liability, the shipper indicates his judgment of the degree of the risk and of needed care; and his silence as to real value is the same as an assertion of mean value, thus keeping the carrier from his adequate reward, and, what is worse, misleading him as to the degree of care and security which he should provide."

The foregoing extract from the opinion in the *Magnin* case on the second appeal (62 N. Y. 35) makes it clear that the *Westcott Case* (61 N. Y. 542) was distinctly overruled, and it is to be observed that the latter case has never been followed in any of the decisions of the court upon the subject rendered since then. When the *Magnin* case came to this court a third time (70 N. Y. 410) the rule laid down on

the second appeal was distinctly reiterated, and it has been followed by this court in several subsequent cases. In *Zimmer v. N. Y. C. & H. R. R. Co.* (137 N. Y. 460) the plaintiff sued to recover the value of a mare killed while in transit on the defendant's road. The contract recited that in consideration of reduced rates it was agreed that in case of loss the value of the mare should be held not to exceed \$100. The mare was killed through the negligence of the carrier. Judge GRAY there said: "In this case the contract did not exempt the company from liability for the negligence which, we must assume, occasioned the loss of the horse. That occurred through none of the causes particularly specified in the contract, and nothing precluded the plaintiff from recovering upon the negligence proven; but the amount of his recovery was limited by the contract to the sum of \$100."

The case last cited was followed in *Wheeler v. Oceanic Steam Nav. Co.* (72 Hun, 5; *affd.*, 149 N. Y. 576), where a passenger upon a transatlantic steamer, holding a passage ticket limiting the liability of the carrier to ten pounds sterling for the loss of goods, the real value of which is not declared, delivered to the carrier with her other baggage a box of valuable portraits, which were lost through the latter's negligence. There it was held that there is no valid distinction in principle between a shipment of goods and a transportation of passengers with the carriage of baggage as an incident, when the contract is one which limits the liability of the carrier, unless a special declaration of value is made by the shipper or passenger. The rule adopted by this court has been sustained by the Federal Supreme Court in *Hart v. Penn. R. R. Co.* (112 U. S. 331), where the contract provided for the transportation of horses which were stated to be of the value of \$200, and the recovery was limited to that amount, although the loss was much greater and was occasioned by the negligence of the carrier.

It has been suggested that there is, or should be, a distinction between a case where the stipulation is designed merely to limit the carrier's liability, as in the case of a passenger whose

baggage is carried free of charge, and the case of a stipulation framed for the double purpose of enabling a carrier of goods for hire to obtain proper compensation, as well as to limit his liability if no declaration of value is made by the shipper. At first glance this suggestion has a plausible appearance, but it does not seem to stand the test of analysis. It is not apparent why a carrier should be subjected to a greater liability in respect of a service which he performs free of charge, or simply as an incident to the carriage of persons, than is imposed upon him in the transportation of merchandise pursuant to a contract in which that is the precise duty which he undertakes for a specified hire. In the carriage of baggage the passenger usually exercises some degree of supervision or direction which may somewhat increase or diminish the carrier's actual responsibility; but in the shipment of goods the carrier takes complete possession and control, so that, if there could be any logical differentiation of the carrier's liability in the two cases, it could very plausibly be argued that it ought to be relaxed rather than augmented in the carriage of a passenger's baggage. But, whatever might be said upon that proposition, it is enough to suggest that it is not an open question in this state, for this court, as we have seen, has held that no such distinction exists.

The judgment herein should be reversed and a new trial granted, with costs to abide the event, unless the plaintiff shall stipulate to reduce his recovery to the sum of fifty dollars, with interest from the date of his loss, and costs, in which event the judgment herein as reduced should be affirmed, without costs of this appeal to either party.

HAIGHT, J. (dissenting). This action was brought to recover the value of the plaintiff's trunk, and wearing apparel therein contained, which was delivered to the defendant company for transportation from New York to Bremen on the North German Lloyd steamship *Grosser Kurfürst*, to sail June 28th, 1900, at twelve o'clock noon, but which, by reason of the negligence of one of the defendant's employees, was

placed on the wrong pier, and was not, therefore, placed on board of the vessel when she sailed, and was subsequently destroyed by fire. The question arising upon the trial with reference to the delivery of the trunk to the defendant and the negligently placing of it upon the wrong pier, was settled by the verdict of the jury and the unanimous affirmance of the judgment entered thereon by the Appellate Division.

The plaintiff had previously procured a ticket from the defendant's office for his transportation from New York to Bremen on the steamship named, which contained the condition to the effect that the defendant should not be liable "for loss of or injury to or delay in delivery of luggage or personal effects of the passengers beyond the amount of fifty dollars, unless the value of the same in excess of that sum be declared at or before the issue of this contract, or at or before the delivery of said luggage to the ship, and freight at current rates for every kind of property is paid thereon." The court, in its charge to the jury, submitted the question as to whether the plaintiff had his attention called to this condition embraced in the ticket at the time he procured the same, or that he knew of the provision at the time of the delivery of the trunk to the defendant. For the purpose of this case I shall assume, but without determining it, that the plaintiff was chargeable with constructive notice of this provision contained in the ticket, and that the court improperly submitted that question to the jury. But it could not possibly have harmed the defendant, if, under the plaintiff's contention, the proper construction of the contract is that it did not relate to the loss or injury of baggage occurring through the negligence of the defendant or of its employees. There was no declaration made on behalf of the plaintiff of the value of the trunk and contents before its delivery to the ship. The defendant asked the court to charge that there can be no recovery for more than fifty dollars. This was refused, and the question is, therefore, presented as to the meaning of this provision. It will be observed that the limitation of the liability of fifty dollars is for the loss or injury to or delay in delivery of lug-

gage or personal effects of the passengers. Nothing is said with reference to negligence of the defendant or of its servants. The limitation of fifty dollars is to the cases of loss, injury or delay therein referred to. At common law the vessel owners were held to strict liability for the care of property delivered to them. They were practically insurers and liable for the property without regard to the question of negligence. It was doubtless for the purpose of relieving the defendant from its strict liability under the common law that the clause in question was inserted in the contract, and not for the purpose of relieving the defendant from its negligence. If common carriers of persons and property are to be relieved from liability for their acts of negligence, then they are no longer under legal obligation to exercise any care or caution with reference to property delivered into their custody for transportation. They may leave it in dangerous or unguarded places, subject to the action of thieves or to injury by reason of storms. They may dump it wherever the whim of a careless or reckless employee may suggest or find most convenient for his purpose. They may put a traveler's trunk on board or leave it, as the inclination of the servant may dictate, and they would be under no obligation to keep a record of it or to aid owners in tracing it in case of loss, for they would owe him no legal duty with reference to its care, protection or even delivery. This is what is meant by the relieving of common carriers from liability for negligence with reference to property delivered to them for transportation. A contract, therefore, which is claimed to relieve a common carrier from negligence should be carefully scrutinized. As was said by MAYNARD, J., in the case of *Rathbone v. N. Y. C. & H. R. R. Co.* (140 N. Y. 48): "It is well settled that these stipulations in the contract will not be construed to relieve the carrier from liability for his own negligent acts. His duty and obligation to exercise a proper degree of care of the property while in his custody is not affected by them. Full and sufficient scope is given to their operation when it is held that they exempt the carrier from his common-law responsibility

as an insurer of the property. It is not reasonable to suppose that the party intended to contract that a bailee for hire might with impunity be careless and remiss in the discharge of the trust reposed in him. If such a result is intended it must be so stated expressly and unequivocally in the contract. General words are not sufficient. Notwithstanding the contract of shipment in this case, defendant's liability for negligence in the handling and transportation of the property remained unimpaired, unless there is some other ground upon which exemption can be predicated." (*Magnin v. Dinsmore*, 56 N. Y. 168; *Minard v. Syracuse, B. & N. Y. R. R. Co.*, 71 N. Y. 180; *Nicholas v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 370; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438.)

I consequently conclude that the losses referred to in the contract had reference to the common-law liability of the common carrier, but not including losses which occurred by reason of the carrier's negligence. It is claimed, however, that a shipper may agree upon the value of the property shipped, and that such an agreement is binding upon him. Very true, if he so expressly agrees. (*Zimmer v. N. Y. C. & H. R. R. Co.*, 137 N. Y. 460.)

But in this case it appears from the evidence that he did not know of the condition limiting the defendant's liability as expressed in the ticket delivered to him, and that he did not have his attention called thereto at the time he purchased the ticket. He at most, therefore, is chargeable only with constructive notice of such a limitation. The trunk lost contained nothing but ordinary wearing apparel, such as was customary for travelers to take on journeys of this character. The value, while exceeding the limitation expressed, did not exceed that ordinarily contained in the luggage of passengers. There was, therefore, no deception as to its character or contents, and it, therefore, is distinguishable from the case of *Magnin v. Dinsmore* (62 N. Y. 35). In that case a box contained bills, checks, and notes of over £4,000 in value, \$20,000. Its contents had not been disclosed to the carrier who was deceived with reference thereto. It, therefore,

appears to me that the restriction as to the amount of the liability contained in the ticket had reference to the losses therein contemplated; and the losses therein contemplated not having reference to losses occurring through negligence, the limitation did not relate to such losses. In the case of *Bermel v. N. Y., N. H. & H. R. R. Co.* (62 App. Div. 389) the common carrier had inserted in the bill of lading a limitation as to the value of the property shipped, with similar conditions to those which we have had under consideration. In that case it was held, by the unanimous decision of the Appellate Division, second department, that the conditions and the limitation as to value had reference to the losses occurring otherwise than through the negligence of the carrier for which it would be liable at common law, and that, therefore, the shipper had the right to recover for all the damages suffered by him by reason of the carrier's negligence. This case was affirmed in the Court of Appeals upon the opinion written in the Appellate Division by WOODWARD, J. (172 N. Y. 639). In *Kenney v. N. Y. C. & H. R. R. Co.* (125 N. Y. 422), GRAY, J., says: "The rule is firmly established in this state that a common carrier may contract for immunity from its negligence, or that of its agents; but that, to accomplish that object, the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule and forbid its operation, except where the carrier's immunity from the consequences of negligence is read in the agreement *ipsissimis verbis*." (See, also, *Wheeler v. Oceanic Steam Navigation Co.*, 125 N. Y. 155-160; *Johnston v. Fargo*, 184 N. Y. 379; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438-450, and authorities cited in the foregoing cases.)

The judgment should be affirmed, with costs.

GRAY, EDWARD T. BARTLETT and HISCOCK, JJ., concur with WERNER, J.; CULLEN, Ch. J., concurs with HAIGHT, J.; O'BRIEN, J., absent.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ABRAHAM H. HUMMEL, Respondent, v. EDWARD J. REARDON, a Peace Officer of the City of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant.

1. CRIMES — STAY OF PROCEEDINGS — BAIL. A defendant, convicted of a crime not punishable with death, who has obtained an order directing the district attorney to show cause why a certificate of reasonable doubt should not be granted and an order directing a stay of execution in the meantime, cannot be admitted to bail until the hearing and determination of the motion for the certificate and the granting thereof. Under the statutes relating thereto (Code Crim. Pro. §§ 527, 529, 535, 556) release on bail can be secured only when a permanent and substantial stay of proceedings has been granted after the allowance of a certificate of reasonable doubt upon due notice to the district attorney of the county in which the conviction was had. The stay upon which bail may be granted is not the temporary *ex parte* stay which may be allowed pending the decision of an application for a certificate of reasonable doubt. In the former case a judge has decided, after argument and consideration, that there is doubt about the correctness of the conviction, and a reason is established for accepting bail and relieving from imprisonment pending appeal. In the latter case no certificate of doubt has been granted, and there is no reason for assuming that the judgment of conviction is erroneous and that the defendant should not be held in custody under it.

2. SAME — RE-ARREST OF DEFENDANT RELEASED ON BAIL PENDING DETERMINATION OF APPLICATION FOR STAY OF PROCEEDINGS — HABEAS CORPUS — ERRONEOUS AFFIRMANCE OF ORDER RELEASING RELATOR FROM CUSTODY. Where a defendant, who had been convicted of the crime of conspiracy, and released on bail pending the decision of his application for a certificate of reasonable doubt, was re-arrested upon the ground that the allowance of bail was without authority and illegal, and he thereupon instituted habeas corpus proceedings which resulted in his discharge from custody, the Appellate Division is not warranted in affirming the order discharging him, because at the time its decision was made a certificate of reasonable doubt had been granted entitling him to be released upon bail. The order should have been reversed, but the decision of the Appellate Division so framed as not to remand the relator to a custody from which he would be entitled to an immediate release.

People ex rel. Hummel v. Reardon, 112 App. Div. 866, reversed

(Argued June 4, 1906; decided October 9, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

April 20, 1906, which affirmed an order of Special Term sustaining a writ of habeas corpus and directing the discharge of the relator from custody.

The facts, so far as material, are stated in the opinion.

William Travers Jerome, District Attorney (Robert C. Taylor of counsel), for appellant. The present Code provisions have entirely uprooted the former loose provisions of the Revised Statutes. A convict cannot now be lawfully admitted to bail pending appeal until the judge has responsibly certified that there is reasonable doubt, and an application for such a certificate cannot be made except upon due notice to the district attorney, and only after the service of formal specifications of error. All that the judge can lawfully do, in the interim, is to "stay the execution" until the determination of the application, whereupon the sheriff must "keep the defendant in his custody without executing the judgment," or if "execution has commenced," *i. e.*, if the defendant has gone to State prison or the penitentiary, he must be restored to his original custody. (Code Crim. Pro. §§ 529-531.) The Code provisions are controlling. (*People v. Hovey*, 92 N. Y. 558; *People v. Jaehne*, 103 N. Y. 182; *People v. Bissert*, 71 App. Div. 118; *People v. Glen*, 173 N. Y. 395; *People v. Trezza*, 125 N. Y. 740; *Matter of Jones*, 181 N. Y. 389; *People v. Rutherford*, 47 App. Div. 209; *People v. Dunn*, 31 App. Div. 139; 157 N. Y. 528; *McKane v. Durston*, 153 U. S. 684; *Andrews v. Swartz*, 156 U. S. 272.)

John B. Stanchfield for respondent. The order sustaining the writ of habeas corpus was proper. (Code Crim. Pro. §§ 529, 555, 583; *People v. Molineux*, 53 Barb. 15; 40 N. Y. 113; *Smith v. People*, 47 N. Y. 330; *McNeill's Case*, 1 Caines, 72; *Ford v. State*, 42 Neb. 419; *State v. Levy*, 24 Minn. 362; *Sprague v. Birdsall*, 2 Cow. 419.)

HISCOCK, J. This appeal involves the sole question whether a person convicted of a crime not punishable with death may

be admitted to bail pending the determination of an application for a certificate of reasonable doubt.

The relator was convicted of the crime of conspiracy in New York county and sentenced to pay a fine of five hundred dollars and to imprisonment for one year in the penitentiary, and was thereupon committed to the city prison. Upon the same day an order to show cause was granted why a certificate of reasonable doubt should not be granted and a stay of execution directed meantime, and at the same time an order was made admitting the defendant to bail until the hearing of said application. The relator having thereupon been rearrested upon the theory that the allowance of bail pending the hearing of said motion was without authority and illegal, habeas corpus proceedings were instituted, resulting in his discharge from such custody. This order, upon appeal, was fully affirmed, but, as I think, erroneously so.

The determination of the question presented for our consideration requires an examination of several sections of the Code of Criminal Procedure.

Section 527, entitled "Stay of Proceedings on Appeal," provides that "An appeal to the Appellate Division of the Supreme Court from a judgment of conviction * * * stays the execution of the judgment * * * upon filing, with the notice of appeal, a certificate of the judge who presided at the trial, or of a justice of the Supreme Court, that in his opinion, there is reasonable doubt whether the judgment should stand, but not otherwise."

Section 529 provides: "The certificate (of reasonable doubt) mentioned in the last two sections (527 and 529) cannot, however, be granted upon an appeal on a conviction of felony or misdemeanor until such notice as the judge may prescribe has been given to the district attorney of the county where the conviction was had, of the application for the certificate, accompanied by a formal specification in writing of the grounds upon which the application is based, but the judge may stay the execution of the judgment until the determination of such application." Said section also provides

that when application for such certificate has been once denied another application shall not be made ; also, that in case of specified delay by the defendant in bringing on for argument his appeal application may be made to have said certificate of reasonable doubt vacated.

Section 555 provides that " After the conviction of a crime not punishable with death, a defendant, who has appealed and when there is a stay of proceedings, but not otherwise, may be admitted to bail :

" 1. As a matter of right, when the appeal is from a judgment imposing a fine only ;

" 2. As a matter of discretion, in all other cases."

Section 556 regulates the nature of bail after conviction and upon appeal, and to its terms I shall refer more in detail hereafter.

There is no doubt but that the judge granting the order to show cause why a certificate of reasonable doubt should not be granted, had the power under section 529 to stay execution of the judgment of conviction against relator until the determination of such application. It may also be granted that section 555 read literally and by itself is broad enough to cover the admission to bail of a defendant pending an application for a certificate when there is a stay of proceedings granted as provided in section 529. But I believe that a broader and more comprehensive view not only of section 555 but of other related sections and of the general trend of criminal procedure upon appeal from conviction will justify the conclusion that said section does not contemplate admission to bail under such a temporary and incidental stay of proceedings, but relates to admission to bail upon an appeal where a more permanent stay has been secured through the granting of a certificate of reasonable doubt, as provided in section 527.

Before statutory enactment to that end a person convicted of a criminal offense had no right of appeal. Under the Revised Statutes there were available the two methods of reviewing a conviction, either by certiorari before judgment

or by writ of error after judgment. Upon the proceeding by certiorari the defendant might have stay of judgment and be admitted to bail. Provision was also made whereby upon review by writ of error there might be a stay of proceedings and the defendant admitted to bail through the medium of habeas corpus proceedings.

Without considering these proceedings in detail, it is to be noted as bearing upon subsequent legislation and making plain the tendency toward greater caution in granting the applications of convicted persons for stays and admission to bail, and thus indirectly bearing upon the specific question at issue, that no notice to the People was required of the application for either writ or for stays or admission to bail of convicted persons. And an examination of the judicial records and literature of those times, and of the suggestions made in connection with the recommendation of adoption of a Code of Criminal Procedure, leaves no doubt that those former methods of review were not only cumbersome, but that oftentimes they were accompanied by undue delay, and laxity in granting stays with resulting admission to bail.

The Code of Criminal Procedure was adopted and concededly it supplants the prior methods of review, and entirely and exclusively provides for and measures the defendant's rights upon appeal from a conviction, so far as those rights are subject to statutory control. Here, again, it is desirable to note especially certain provisions in the sections already referred to, concerning appeals as expressive of the requirement for greater vigilance in granting stays and admitting to bail.

Bail can be received only when a stay of proceedings has been granted, and a permanent, substantial stay of proceedings can be secured only when a certificate of reasonable doubt has been granted, after notice to the People through their representative officer, upon due specification of alleged errors, and even this certificate and resulting stay may be vacated if the defendant delays the hearing of his appeal. This line of provisions, beyond question, prevents a defend-

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

ant who has been convicted and committed to the custody of the law from regaining his liberty upon bail without notice to the district attorney, and without a public record by some judge of his deliberate opinion that allegations of error raise a reasonable doubt whether the conviction should stand. Incidentally and temporarily a stay may be granted pending this application without any notice. Some of the evil consequences are obvious which might result from *ex parte* and inadvertent action in admitting convicted persons to bail during this incidental stay without any notice to the district attorney, and I think that it is in accordance with the general policy evidenced by all of these sections to construe section 555, giving the right to admit to bail pending a stay of proceedings, as referring to the substantial, important stay of proceedings provided for by section 527 as the result of a certificate of reasonable doubt, and not as meaning and referring to the temporary *ex parte* stay allowed by section 529 pending the decision of the application for such certificate. In the former case a judge has decided, after argument and consideration, that there is doubt about the correctness of the conviction, and a reason is established for accepting bail and relieving from imprisonment pending appeal. In the latter case no certificate of doubt has been granted, and there is no reason for assuming that the judgment of conviction is erroneous and that the defendant should not be held in custody under it.

So much for the reasoning which seems to rest upon principles of general policy. It seems to me that the details of the sections relating to bail confirm that reasoning.

Section 556, which alone provides for the nature of the bail to be taken under section 555 when there is a stay of proceedings, requires bail from the defendant as follows :

"1. If the appeal be from a judgment imposing a fine only, on the undertaking of bail, that he will pay the same, or such part of it as the appellate court may direct, if the judgment be affirmed or modified or the appeal dismissed, or the certificate of reasonable doubt be vacated as provided in section five hundred and twenty-nine.

"2. If judgment of imprisonment have been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or if the certificate of reasonable doubt be vacated as aforesaid."

It is apparent at once that the undertaking above provided for is adapted to a release upon bail pending final disposition of the appeal, and is not at all adapted to such release under the temporary stay pending application for a certificate of reasonable doubt. The section assumes that a certificate of reasonable doubt has been granted, and, therefore, relates to bail under a stay following such certificate and not to bail under the temporary stay preceding such certificate. It is said that this clause was incorporated into the section by amendment and, therefore, is not significant as indicating the purpose of the statute. If we should grant this explanation to be more effective than I really think it is, we still find the other provisions of the section equally requiring an undertaking binding the defendant to answer a final disposition of his appeal, and not an unfavorable disposition of his application for a certificate. In fact the learned Appellate Division ultimately seems to concede that there is no provision for an undertaking to be executed by a defendant upon release upon bail pending his application for a certificate. But it is said that if the statute has provided that he may thus be released he will not be deprived of this right by reason of this omission; that it is a *casus omissus* and not important. This seems to me to be a begging of the question.

The statute has provided for one stay of proceedings following a certificate that there is merit to the defendant's appeal, which is a very substantial right and which ordinarily will continue until the final disposition of the appeal. It has provided for another stay which is temporary and incidental to an application. Then it has provided that a defendant may be released upon bail when there is a stay of proceedings, and in prescribing the conditions of the undertaking to be executed adapts it entirely to a release under the former

stay and not at all to one under the latter. Under these circumstances, in attempting to determine whether the legislature intended that a defendant should be released upon bail under both stays or simply under the former and substantial one, it seems to me that full provision for a form of bail under such former one and an absolute omission to provide for bail under the latter one is not to be regarded as a matter of inadvertence, but as clearly indicating the intention that the provisions for release under a stay do not apply to the temporary one.

Finally it is urged that such interpretation and conclusion may result in the temporary confinement of one who has a meritorious appeal, and will be harsh and unjust. I believe that this objection will prove to be rather based upon a fear than sustained by reality, and that not many persons convicted of criminal offenses and who have good grounds for appeal will be treated with undue severity. We may anticipate that a judge before whom has been conducted a criminal trial will be able to determine with fair accuracy whether a conviction rests upon debatable grounds, and that if it does a certificate will be granted forthwith and the defendant saved from imprisonment pending the determination of his appeal. A judge other than the one before whom the trial has occurred has the power, by prescribing short notice to the district attorney, to compel a prompt determination of the application for a certificate.

Remembering always that the statute by granting any right of review has secured to convicted persons a favor which they otherwise would not enjoy, it will not be too much if the construction adopted, under the safeguards mentioned, does result in treating a judgment of conviction obtained by due process, legal and entitled to enforcement even to the extent of taking the defendant into custody unless and until some duly constituted authority shall certify that reasonable grounds exist for questioning its correctness.

We can hardly close our minds to the fact that at the present time the universal trend in public discussion of our sys-

tem of criminal procedure is in the direction of criticising its leniency and tardiness whereby criminals entirely escape or unduly postpone the day of punishment, and the construction which I have endeavored to justify will close one avenue through which persons duly convicted, by aid of *ex parte* statements and allegations of error, may escape, temporarily, enforcement of the judgment of conviction which has been rendered against them.

The fact has not been overlooked that a somewhat lengthy discussion has been given to a question which so far as this case is concerned has become academic. We have been assured, however, and readily have been able to see that the question here presented is an important one and liable to arise with much frequency, and under such circumstances it has been deemed wise to express our views in the case now presented for guidance in the future.

The argument has been advanced that independent of the merits of the underlying question the order releasing the relator was properly affirmed by the Appellate Division because at the time said latter court made its decision a certificate of reasonable doubt had been granted entitling the defendant to be released upon bail and that such a fact could be taken into account as justifying the original order.

I do not find in the statute relating to habeas corpus any provision, or in the law relating thereto any established principle, which seems to warrant the view that an order in a statutory proceeding erroneous upon the facts existing at the time it is made may be affirmed upon appeal because meantime some step has been taken which under independent and different provisions justifies the same result which was originally secured by the erroneous order.

In his application for a writ of habeas corpus the relator by his petition was required to set forth "the cause or pretense of the imprisonment or restraint according to his (the) best knowledge and belief." (§ 2019.) The person to whom the writ was issued was required by his return to set forth the authority and true cause of the imprisonment or restraint.

(§ 2026.) Thereupon the court or judge was required to proceed "in a summary way to hear the evidence produced in support of or against the imprisonment or detention and to dispose of the prisoner as the justice of the case requires." This petition, return and decision spoke of and were based upon the facts as they existed at the time. The appeal from the order to the Appellate Division would naturally and properly bring up those facts as they thus existed and not others subsequently arising. While thus, as I think, the Appellate Division would not be justified in affirming the order which was made because subsequently to the determination of the habeas corpus proceedings a certificate of reasonable doubt had been granted which entitled relator to a stay and release upon bail, but would be compelled to reverse the same, still very naturally upon being informed that such latter steps had been taken and that the defendant was, therefore, entitled to be upon bail, it would so frame its decision as not uselessly to remand the relator to a custody from which he would be entitled to immediate release.

The order should be reversed, but inasmuch as the defendant has now been released upon bail under a stay following a certificate of reasonable doubt, it is unnecessary to direct that he should be remanded to custody.

O'BRIEN, J. (dissenting). The appeal in this case is from an order of the Appellate Division, which unanimously affirmed an order of the Special Term sustaining a writ of habeas corpus and admitting the relator to bail. The only question presented is whether this order made by the learned court below is affected with any legal error. There is no other question in the case that this court can review.

Singularly enough it is asserted and urged by both parties upon this appeal that the question is purely academic, that whatever way it may be decided here, it can have no effect upon the parties to the controversy. The learned district attorney at the close of his brief, after stating that the order should be reversed, concludes with the following statement:

Dissenting opinion, per O'BRIEN, J.

[Vol. 188.]

"if, however, this court should decline to consider the question on the ground that it was academic he respectfully urges that the court will so declare. If the question is academic here, it was equally academic below. Should this court decline to reverse or to affirm or to express its own views of the law, in that event it is urged at least to state that the expressions in the opinion below are obiter." The substance of the argument of the district attorney is directed not so much against the judgment rendered as the opinion delivered. It is not unusual in this court to deal with a perfectly correct decision that may, however, be based to some extent upon an erroneous reason. But it seems to me that in this case the order complained of is sustained by the plain language of the statute. The whole contention on the part of the district attorney is that this statute does not mean what it says, and that instead of following its plain terms it should receive some other construction. This contention, it seems to me, is fully answered by the learned opinion of the court below, and I do not propose to deal with any question here except the single question presented, and that is whether, in making the order complained of, the learned court below committed a legal error. The learned court from which this appeal is taken stated the question before it in these words: "The sole question presented is whether or not, after a conviction of a crime not punishable with death, a defendant, who has appealed and obtained an order from a justice of the Supreme Court staying the execution of the judgment pending the determination of an application for a certificate of reasonable doubt, may be admitted to bail before the granting of the application." The question in this court is still narrower, and it may be stated in these terms: Did the Appellate Division, when granting the order appealed from, have before it the necessary facts and documents which made it the duty of the court to affirm the order sustaining the writ of habeas corpus and admitting the relator to bail? If so, then the order is clearly right and should be affirmed.

It will be seen from what has been said that this contro-

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

versy originated in an application by the relator after conviction to a judge of the court for a certificate of reasonable doubt and for a stay of proceedings pending the determination of that application. The stay of proceedings was granted and subsequently the certificate of reasonable doubt; and the sole contention of the learned district attorney arises from the fact that the relator was admitted to bail upon this application and before the judge had made the certificate. It is admitted that if the relator had been discharged upon bail a few hours after the judge had signed the certificate, that the proceedings would then be perfectly proper, but that the judge in staying the proceedings and allowing bail a few hours or days before the certificate was formulated exceeded his authority. In order to sustain that contention it seems to me that a plain and simple statute must be perverted to purposes that the legislature has not expressed, and the enactment is so general and so simple in its language that it would seem to be not open to construction.

There is no dispute about the power of the judge in this case to grant a stay of proceedings pending the application. (Code Crim. Pro. § 529.) He did grant a stay and concurrently admitted the relator to bail. That is the only error complained of. It is provided by section 555 of the same Code that a defendant convicted of a crime not punishable with death may be admitted to bail in a case where he has appealed, and when there is a stay of proceedings. In this case the relator had appealed before the bail was allowed, as appears from his replication to the traverse in the record. There was a stay of proceedings also, and so the case is brought directly within the plain words of the statute. The relator had been convicted of conspiracy. He had appealed. He had procured a stay of proceedings, and so the case falls directly within the plain words of the statute. The judge had the power to grant a stay pending the application for the certificate of reasonable doubt, and he had the power to admit the relator to bail in a case where he had appealed and where there was a stay

Dissenting opinion, per O'BRIEN, J.

[Vol. 186.]

But it is contended that the stay granted by the judge in this case was only temporary, and the distinction is sought to be made between a temporary stay and what is called a permanent stay. The distinction, however, is not perceived, since every stay of proceedings is necessarily temporary in the sense that it is operative only until some other or further judicial action is had. One stay may be for a longer time than another, but they are all temporary, and operate in every case only until the object for which it was granted is attained. I am not able thus far to discover any legal error in the proceedings of the learned judge in admitting the relator to bail.

But there is another view of this case which seems to me to be conclusive against the appeal. The learned court below, as a court, had the power and it was its duty to sustain the writ of habeas corpus if it had the necessary facts before it.

In this respect it is required to act as a court of original jurisdiction, and every member of the court sitting alone possessed the same power and was charged with the same duty. (Code Civ. Pro. § 2017.) There is no dispute about the fact that when the learned court below made the order appealed from it had before it every fact and every document that called for the relator's discharge, and, hence, it was right in sustaining the writ, even if there was any question as to the power to admit the relator to bail pending the application for the certificate of reasonable doubt. The principle is well settled that a court of review is not necessarily bound to reverse a judgment or order for some defect in the original proceeding. If the defect consists in the absence of a document or record it may be produced on the argument with the same force and effect as if produced on the original application. (*Jarvis v. Sewall*, 40 Barb. 449; *Cutlin v. Grissler*, 57 N. Y. 373; *Wines v. Mayor, etc., of N. Y.*, 70 N. Y. 613; *Matter of Cooper*, 93 N. Y. 507; *Dunham v. Townshend*, 118 N. Y. 286; *Stemmler v. Mayor, etc., of N. Y.*, 179 N. Y. 482.)

And yet it is contended that the learned court below should

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

have reversed the order, and that it committed a legal error in affirming it. If it had reversed the order and remanded the relator to prison it could be called upon the next moment to discharge him upon habeas corpus. It had before it all the necessary facts and records which required it to act in giving effect to this writ of liberty. It had the relator's petition, the other pleadings in the case and the certificate of reasonable doubt, and there could be no answer under these circumstances to the relator's application for a discharge, and all this being true, can it be said with any propriety that the court committed a legal error in sustaining the order made by one of its own members admitting the relator to bail, and that it should have reversed that order because made in advance of the certificate of reasonable doubt which was before the court on the argument? If the court, when making the order appealed from, could do just what one of its members had done before, was it legal error to confirm what had been done, even though a document, namely, the certificate of reasonable doubt, was not before the judge when he made the order? It has been shown that the court was not only a court of review, but in the particular case before it, a court possessing original jurisdiction, and to reverse the order of the Special Term sustaining the writ and admitting the relator to bail would seem to encourage a process of circumlocution in habeas corpus proceedings utterly at variance with the spirit and purpose of that statute. I think that there was no legal error in the decision below, and that the order should be affirmed or the appeal dismissed.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and CHASE, JJ., concur with HISCOCK, J.; O'BRIEN, J., reads dissenting opinion.

Order reversed.

CHARLES J. PHALEN, Appellant, v. THE UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee under the Will of JAMES PHALEN, Deceased, et al., Respondents.

1. ANTE-NUPTIAL CONTRACT — PROVISION THEREOF, WHEREBY FATHER AGREED TO MAKE NO DISTINCTION BETWEEN HIS SON AND OTHER CHILDREN IN THE DISTRIBUTION OF HIS ESTATE BY WILL — WHEN THE SON MAY ENFORCE THE CONTRACT BY ACTION IN EQUITY. Where it was provided in formal marriage articles entered into by a father with his son and other interested parties, in contemplation of the marriage of the son, which took place a few days later, that the father should make no distinction between his children in the distribution of his estate by will, and the father subsequently died leaving a will whereby he carried out the agreement contained in the marriage articles, but by a codicil, executed a short time before his death, directed that the portion of his residuary estate, which he had bequeathed absolutely to the son, should be held in trust, the income thereof to be paid to such son during his life and upon his death the principal to go to his heirs at law, the corresponding portions of the residuary estate being given absolutely to the other children of the testator, the son, after the probate of the will and codicils and the final decree settling the estate and distributing it in accordance with the directions contained in the will and codicils, may maintain, against the trustees under his father's will, an action for the specific performance of the marriage contract, although he did not object to the probate of the will and codicils, or the judicial settlement and distribution in accordance therewith.

2. SAME — FAILURE OF SON TO INTERPOSE OBJECTIONS TO FATHER'S WILL DOES NOT PRECLUDE MAINTENANCE OF ACTION TO ENFORCE ANTE-NUPTIAL CONTRACT. The contention, that if the ante-nuptial contract be held to be valid and enforceable, it will operate as a testamentary instrument which the son is precluded from enforcing because he interposed no objection to the probate of his father's will, is untenable, where the direct and only purpose of the agreement, plainly expressed, was to secure to the son an equal share with his sister in the distribution of his father's estate; since equity, if no good reason intervenes, will give effect to the expressed intention of the contract.

3. SAME — COMPLAINT IN EQUITABLE ACTION NOT DEMURRABLE BECAUSE ANTE-NUPTIAL CONTRACT WOULD NOT SUPPORT ACTION AT LAW. The complaint in the action to enforce the ante-nuptial contract is not demurrable as failing to state a good cause of action, because the contract would not support an action at law, since there are many contracts upon which an action at law cannot be maintained that are enforceable in equity.

4. SAME — VALIDITY OF CONSIDERATION OF ANTE-NUPTIAL CONTRACT. The contention that there was no consideration as between the father and son which would enable the latter to maintain an action to enforce the ante-nuptial contract is without force and cannot be sustained; such agreements are favored by the courts and have been upheld and enforced in equity whenever the contingency provided by the contract has arisen; furthermore, the son was a party to the agreement and performed on his part by the marriage to his wife; he had a legal interest in the complete execution of the contract, and the father having failed to perform the agreement to give the son the same share as that given to his sisters, the son can compel performance of the contract unless some good reason is made to appear why he should not be permitted to do so.

Phalen v. United States Trust Co., 108 App. Div. 865, reversed.

(Argued May 1, 1906; decided October 9, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 25, 1905, which affirmed a final judgment dismissing the complaint herein entered upon an order of said Appellate Division, which reversed an interlocutory judgment of Special Term overruling a demurrer to the complaint and sustained such demurrer.

This action was brought by the plaintiff, Charles James Phalen, to enforce specific performance of formal marriage articles entered into in the city of Paris, France, on August 7th, 1873, in contemplation of the plaintiff's marriage to Julia de Zakrevsky, the daughter of a Russian nobleman. The parties to such articles were the plaintiff, his father and mother, his intended bride and her father. His father, the testator, James Phalen, covenanted and agreed in such articles, so far as material to the questions presented on this appeal, to make no distinction between his children in the distribution of his estate by will. The marriage contemplated by the articles took place a few days after their execution.

The plaintiff's father died in 1887. He left a will dated May 15th, 1882, whereby he carried out his agreements contained in the marriage articles. He subsequently executed various codicils thereto, none of which conflicted with the provisions of the articles, except the seventh and last. By that

codicil the testator directed that the portion of his residuary estate which he had bequeathed to the plaintiff absolutely should be held in trust, the income thereof to be paid to him during his life, and upon his death the principal was to go to his heirs at law. The testator had, however, given corresponding portions of his residuary estate to his other children absolutely.

The will and codicil were thereafter admitted to probate. An accounting was had by the executors, upon which the plaintiff duly appeared, interposed objections, but subsequently withdrew them. A final decree was thereafter entered distributing the estate in accordance with the directions contained in the will and codicils, and not according to the marriage articles.

The foregoing are, substantially, the material facts set forth in the complaint. The defendant trust company, as trustee under the will of the testator, interposed a demurrer to the complaint upon the ground, among others, that it did not set forth facts sufficient to constitute a cause of action. The demurrer was overruled at the Special Term, but sustained by the Appellate Division.

Alexander R. Gulick and *Frederick S. Woodruff* for appellant. The complaint states facts sufficient to constitute a cause of action. (*Colby v. Colby*, 81 Hun, 221; *Winne v. Winne*, 166 N. Y. 263; *Kine v. Farrell*, 71 App. Div. 219; *Parsell v. Stryker*, 41 N. Y. 480; *Edson v. Parsons*, 155 N. Y. 555; *Shakespeare v. Markham*, 10 Hun, 311; *Healy v. Healy*, 55 App. Div. 215; *Gates v. Gates*, 34 App. Div. 608; *Godine v. Kidd*, 64 Hun, 585.) The plaintiff is entitled to the equitable relief demanded in the complaint. (*Winne v. Winne*, 166 N. Y. 263; *Van Camp v. Searle*, 147 N. Y. 150; *Husted v. Thompson*, 7 App. Div. 66; *Kine v. Farrell*, 71 App. Div. 219; *Colby v. Colby*, 81 Hun, 221; *Shakespeare v. Markham*, 10 Hun, 311; *Corscadden v. Haswell*, 88 App. Div. 158; *Galway v. M. St. R. Co.*, 128 N. Y. 132; *Treadwell v. Clark*, 73 App. Div. 473; *Kenyon v. National Life Ins. Co.*, 39 App. Div. 276.)

N. Y. Rep.] Opinion of the Court, per WERNER, J.

Edward W. Sheldon for respondents. The plaintiff is not entitled to the equitable relief demanded because no case for equitable interference is presented; he had a complete remedy at law, and he has been guilty of laches in bringing his suit. (*Matter of Argus Co.*, 138 N. Y. 557; *Mahaney v. Carr*, 175 N. Y. 454; *Hamlin v. Stevens*, 177 N. Y. 39; *Idv v. Brown*, 178 N. Y. 26; *Winne v. Winne*, 166 N. Y. 263; *Andrews v. Brewster*, 124 N. Y. 433; *Porter v. Dunn*, 131 N. Y. 314; *Peck v. Vandemark*, 99 N. Y. 29; *Leahy v. Campbell*, 70 App. Div. 127; *Gall v. Gall*, 27 App. Div. 173.)

WERNER, J. We think the complaint sets forth a good cause of action in equity. To hold otherwise we would have to overturn principles of law and equity that have been recognized and established for centuries.

Ante-nuptial contracts, whereby the parents of the parties about to marry have agreed to settle property upon one or both of the spouses, either upon the performance of the marriage ceremony or by testamentary devise or bequest, are of such frequent occurrence, especially in England, that they form a distinct class in the body of our law. For the purposes of this discussion we may assume that this action could not be maintained at law, although there is very respectable authority to the contrary in England, where actions at law have been maintained even upon informal agreements of this nature. (*Shadwell v. Shadwell*, 30 L. J. [C. P.] 145; 9 C. B. [N. S.] 159; *Douglas v. Vincent*, 2 Vernon, 201.) One of the very purposes of equity is to aid where the law fails. In the determination of this appeal it should be borne in mind that a court of equity will take into consideration the facts and circumstances appearing when the case is tried. If it should then appear that the plaintiff's habits are such as to endanger the safety of the fund which he claims, and that its transmission to him might deprive his wife and children of proper means of support; or if for any other good reason a court of equity might deem it unfair, inequitable or unjust that specific performance of the contract in suit should be decreed, a wise

judicial discretion would, of course, be interposed to withhold a decree, the effect of which would be to defeat the very object for which the contract was made. A court of equity can always mould its decrees so as to measure out justice to all concerned, and the question whether specific performance will or will not be decreed in a given case is always addressed, in the first instance, to the sound judicial discretion of the court whose aid is invoked. (*Seymour v. De Lancey*, 6 Johns. Ch. 222; *Margraf v. Muir*, 57 N. Y. 155; *Day v. Hunt*, 112 id. 191; *Conger v. N. Y., W. S. & B. R. R. Co.*, 120 id. 29; *Stokes v. Stokes*, 155 id. 590.) And it is usually a question that must be decided in the light of the facts and circumstances existing at the time of the trial, so that it can rarely be disposed of upon a demurrer to a complaint.

It is suggested that if we should give effect to the antenuptial contract formally drawn up and signed by the plaintiff and all other parties in interest, we would be treating it as a testamentary instrument which the plaintiff is, in some unexplained way, precluded from enforcing because he interposed no objections to the probate of his father's will. We think there is no force in this contention. Such agreements have been upheld for hundreds of years, although their ultimate effect is usually to change the current of attempted testamentary disposition of estates. The direct, and, indeed, the only, purpose of this agreement, plainly expressed, was to secure to the plaintiff an equal share with his sisters in the distribution of his father's estate. That was the end in view, and equity, if no good reason intervenes, will give effect to the expressed intention. The principle upon which such agreements are sustained was stated by Lord CAMDEN as early as the year 1769, in *Durfour v. Ferraro* (Hargrave's Jurid. Arg. 304), and it was not then new. That was a case of mutual wills, in which the learned jurist said (p. 309): "Though a will is always revocable, and the last must always be the testator's will, yet a man may so bind his assets by agreement that his will shall be a trustee for performance of

his agreement. A covenant to leave so much to his wife or daughter, etc. * * * These cases are common; and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke. This court does not set aside the will, but makes the devisee, heir or executor, trustee to perform the contract. * * * No man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him. This court is never deceived by the form of instruments. The actions of men here are stripped of their legal clothing, and appear in their first naked simplicity. Good faith and conscience are the rules by which every transaction is judged in this court; and there is not an instance to be found since the jurisdiction was established where one man has ever been released from his engagement after the other has performed his part."

We deem it unnecessary to discuss the intermediate cases which have fully and firmly established the principle that a man's representatives shall be trustees of a resulting trust for the benefit of those to whom he has bound his estate by such a contract as is here involved, for we consider the comparatively modern case of *Johnston v. Spicer* (107 N. Y. 185) decisive of this whole controversy. In that case the husband by an ante-nuptial contract had provided that in case of his death without issue all his property should belong to the lady whom he was about to marry. The parties intermarried and the husband predeceased the wife intestate and without issue. This court held that by virtue of the contract the husband's estate went to the heirs of the wife, and speaking through RUGER, Ch. J., said: "It has been the constant practice of the courts of this country, as well as of England, to enforce ante-nuptial agreements according to their terms, whether they relate to existing or after-acquired property, and to decree a specific or substituted performance of them according to the nature of the case (citing authorities). * * * The suggestion that such contracts may be invalid,

as being of a testamentary character and as contravening the statute regulating the execution of wills is of no force in view of the fact that for many centuries they have been sanctioned and protected by the courts, and their validity in this state has been expressly ratified and approved by statutory provisions. (Laws of 1848, chap. 200, § 4; Laws of 1849, chap. 375, § 3.) To the same effect are numerous other cases in this state, and they are all based upon the principle that although a contract may contain covenants to leave property by will, that is no reason why it should not be performed. The facts of those cases are too voluminous and various for repetition here, and a few of them are cited merely to show how firmly the principle is established. (*Parsell v. Stryker*, 41 N. Y. 480; *Stanton v. Miller*, 58 id. 192; *Shakespeare v. Markham*, 72 id. 400; *Winne v. Winne*, 166 id. 263; *Gall v. Gall*, 64 Hun, 600; *Gates v. Gates*, 34 App. Div. 608.)

Neither do we subscribe to the proposition that this complaint does not state a good cause of action, because the contract which it sets forth may be one which would not support an action at law. There are many contracts upon which an action at law cannot be maintained that are enforceable in equity. "There are agreements which the common law, by virtue of its own doctrines, irrespective of statutory regulation, treats as invalid, as not contracts, and for which it furnishes no remedy; but which equity, in the application of its conscientious principles, considers as binding, and enforces by awarding its relief of a specific performance." (Pomeroy on Specific Performance, § 31.) In *Sprague v. Cochran* (144 N. Y. 104) this principle was applied to take a case out of the operation of the Statute of Frauds, and to the same effect is *Smith v. Smith* (125 N. Y. 224). Many more cases might be cited to illustrate the rule that equity decrees performance of just contracts which are not enforceable at law, but this axiomatic fact needs no further demonstration.

We now pass to that phase of the discussion in which it is argued that there was no consideration as between father and son which enables the latter to maintain an action to enforce

the agreement. In support of this position there are cited some recent cases in this court, founded upon oral agreements to devise or convey estates in consideration of services rendered to, or benefits actually received by, the promisors, who died without having carried out their respective parts of the several agreements. Such contracts have been held at least open to suspicion and courts are very reluctant to enforce them. (*Gall v. Gall*, 138 N. Y. 675; *Mahaney v. Carr*, 175 id. 454; *Ide v. Brown*, 178 id. 26.) But there is a very wide distinction between those cases and the case at bar. This action is founded upon what are known as formal marriage articles whereby certain property is settled or agreed to be settled upon either one or both of the spouses about to be married. Instead of being frowned upon, such agreements are favored by the courts and have been upheld and enforced in equity whenever the contingency provided by the contract arose. (*Johnston v. Spicer*, 107 N. Y. 185.) "They usually proceed from the prudence and foresight of friends or the warm and anxious affection of parents; and, if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created. A court of equity will carry the intention of these settlements into effect, and not permit the intention to be defeated." (2 Kent's Comm. 165.)

It may be conceded that when the elder Phalen made his will he complied with the terms of the contract, in so far as it related to a testamentary provision for the wife and children of the plaintiff, but he did not perform his agreement to give to the plaintiff the same share as his two sisters, and the facts thus far disclosed suggest no reason why a court of equity should not compel complete performance at the suit of the son. He was a party to the agreement and performed on his part by the marriage with his wife. He had a legal interest in the complete execution of the contract and, under principles now well settled, he can compel performance unless some good reason is made to appear why he should not be permitted to do so.

It is the rule, both in law and equity, as was held in *Borland v. Welch* (162 N. Y. 104), that such agreements cannot be enforced by mere volunteers or strangers to the consideration. In that case collateral relatives of the wife sought to claim under a marriage settlement made between the husband and wife and trustees, and it was held that they were mere volunteers. But there Judge CULLEN referred to the rule, subscribed to by this court, that even a person not a party to such a contract may compel performance if it has been made for his benefit. In one case it was held that the relation of parent and child (*Todd v. Weber*, 95 N. Y. 181), and in another husband and wife (*Buchanan v. Tilden*, 158 N. Y. 109), was sufficient consideration to support the action. It is not necessary to go so far in this case. Here the plaintiff was not only within the "influence of the consideration," as it was called, but was actually a party to the contract. In *Borland v. Welch* (*supra*) Judge CULLEN quotes with approval the general rule laid down in *Atherly on Marriage Settlements* (p. 125): "Equity will execute marriage and other family settlements at the instance of all persons who are within the influence of the marriage consideration, for all these rest their claims on the ground of a valuable consideration." This statement of the rule was concurred in by all the members of this court then sitting, and we regard it as entirely sound in principle. The strict legal definition of consideration need not here be discussed, since marriage settlements have always been regarded as exceptions to the general rule upon this question. "Articles for settlements in most cases stipulate for benefits to persons other than parties to them. The frequent use of such stipulations during the past two centuries, and the number of cases in which benefits stipulated for have been secured by the courts to those for whom they were intended, show that both conveyancers and judges have relied on and assumed their validity generally. Yet they are obnoxious to a general rule of law and equity, and depend for their efficacy on exceptions from that rule made in favor of them, and upon a doctrine of equity the scope of which

has hardly yet been accurately determined." (Vaizey's Law of Settlements, vol. 1, p. 140.)

The question as to what persons are within the consideration of the agreement in this class of cases has frequently arisen, but it has never been doubted that the parties whose marriage forms the occasion of the agreement are within the consideration and entitled to enforce the contract. Even the issue of such marriage may enforce such an agreement, although they may not be born at the time it is made. (*Gale v. Gale*, L. R. [6 Ch. D.] 144, 148.) "The promise of a third party may be for the wife's benefit, or it may be for the mutual benefit of the married parties, and enforceable accordingly." (Schouler's Domestic Relations, § 178.) Actions at law have even been sustained upon mere letters to the party about to marry and at his suit, although the only consideration was the marriage. In *Shadwell v. Shadwell* (30 L. J. [C. P. 1860] 145; 9 C. B. [N. S.] 159) the defendant's testator wrote to his nephew, the plaintiff, as follows: "My dear Lancey.—I am glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life, and until your annual income derived from your profession of a Chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require." In an action by the nephew to recover, after his marriage with the lady named, the arrears of the annuity promised he was permitted to recover at law. In the case of *Coverdale v. Eastwood* (L. R. [15 Eq.] 121), after proposals of marriage had been accepted, the lady's father wrote to the intended husband as follows: "V. being my only child, of course she will come into possession of what belongs to me at my decease." In other letters he made statements evidencing the same intention. The father, being then a widower, subsequently remarried. Upon his death he left a will bequeathing part of his estate to his widow and creating certain annuities. Upon a bill filed by the daughter for the enforcement

of this contract, it was held, notwithstanding the manifest equities of the widow, that the daughter was entitled to the whole estate. This, as Mr. Schouler says, is a harsh case. Similar informal agreements have been enforced many times in England. (*Douglas v. Vincent*, 2 Vernon, 201; *Wankford v. Fotherley*, Id. 322; *Moore v. Hart*, 1 id. 201.)

The foregoing principles and authorities seem to completely dispose of this case, and the discussion might well close at this point, but there are a few authorities which need only to be cited to show that covenants in marriage settlements, such as the one here in question, binding the parent to leave to a child all or an aliquot part of his property at death, are most usual in such settlements, and have always been sustained. *Laver v. Fielder* (32 Beav. 1) presented the same general features as those in the case at bar, except that the agreement was informal and the plaintiff was not a party thereto. It was contained in a letter by the father to the prospective son-in law in which he promised that "at my decease she (the daughter) shall be entitled to her share of whatever property I may die seized." The father, in making his will, failed to comply with this agreement, and after a suit by the widow and a son to settle the estate, the daughter was permitted to maintain an action for the enforcement of the agreement and judgment was decreed in her favor. In *Jones v. Martin* (3 Anstr. 822; more fully reported in 5 Ves. 266, note) the father covenanted on his daughter's marriage to leave her at his death an equal share of personalty with his son. The father in his lifetime transferred certain property to his son which was more than the latter's proportion as fixed by the marriage settlement. In an action brought after the parent's death by the daughter and her husband for an accounting and an enforcement of the agreement, judgment was rendered for the relief asked. It was held in the House of Lords that "The contract was stated by counsel for the respondent to be vague, and idle, unmeaning and insecure. It is not, however, an unusual covenant in settlements; many marriages are entered into on such covenants; and they are not inexpedient. They are entitled to

favourable consideration. * * * But then it does not confine or restrict the father's powers. He may alter the nature of his property from personal to real; or he may give scope to projects; or indulge in a free and unlimited expense. But he must not be allowed to entertain more partial inclinations and dispositions towards one child than another." In *Bennett v. Hoildsworth* (L. R. [6 Ch. Div.] 671) the father, by a settlement prior to the marriage of his daughter, covenanted that he would, by his will, divide his estate into as many equal parts as he had children, one of such parts for the benefit of his daughter and her husband, remainder to their issue. He failed to carry out the provision for this settlement. In an action by the trustees of the settlement, the agreement was held binding. In that case the vice-chancellor said: "The settlement is, in my opinion, in very plain terms. It does entitle the parties under the settlement to have one equal fourth part of the whole of the testator's estate applied upon the terms of the settlement, but it is only upon the terms of the settlement. The representative of the trustees of the settlement, who asks by this suit to have the trusts of that deed carried into execution, does not ask for the payment of any debt, but asks that the fourth part may be ascertained, and that it may be paid to him in satisfaction of the obligation contained in the settlement. In my opinion, that is a claim which cannot be resisted." To the same effect is *McCarogher v. Whieldon* (L. R. [3 Eq.] 236). Again, in *Willis v. Black* (4 Russ. 170), the father covenanted upon the marriage of his daughter to settle upon her and her husband, among other things, as great a share of his property as he should by his will or otherwise provide for any of his younger children. That agreement was enforced after the father's death at the suit of the trustees of the settlement. (*Romaine v. Onslow*, 24 Wkly. Rep. 899.) In *Keays v. Gilmore* (Irish R. [8 Eq.] 296) the father, in a letter to a cousin, promised, upon the marriage of his son, to give to his son upon the father's death a child's portion of his estate. An action was maintained by the son's wife as his executrix

for a construction of the agreement and its validity was sustained, and within the past year the Irish Court of Chancery (*Doyle v. Crean*, 1 Irish R. [1905] 252) gave effect to a contract almost exactly similar in its terms. The father, by a settlement made upon the marriage of his daughter, agreed to distribute his estate equally among his children. An action was maintained by the trustees of the settlement on behalf of the daughter without question as to the daughter's right to insist upon the performance of the agreement. Other cases illustrating the general principle are *Eardley v. Owen* (10 Beav. 572) and *In re Brookman's Trust* (L. R. [5 Ch. App.] 182). These cases disclose how uniformly such agreements have been sustained by the courts.

Since the demurrer was not taken on the ground that the plaintiff's wife was a necessary party, that question is not now before us. It may be that if the case should come to trial, she ought to be brought in as a party so that the rights of all persons in interest may be properly presented and disposed of. Specific performance ought not to be decreed unless all proper parties are before the court. (*Miller v. Bear*, 3 Paige Ch. 466.)

The order of the Appellate Division sustaining the demurrer should be reversed, and the interlocutory judgment of the Special Term overruling the demurrer affirmed, with costs in all courts, with leave to defendant to withdraw demurrer and serve answer within twenty days upon payment of costs.

O'BRIEN, J. (dissenting). This is an action for specific performance of an alleged contract claimed to have been made between the plaintiff and his father. The father was a citizen of New York, but for many years prior to his death he resided with his family in Paris. He died in that city on the 20th of January, 1887, leaving a will executed there, to which was attached seven codicils, the last or seventh of the codicils having been executed on the 17th of January, 1887, a few days prior to his death. By this will and the codicils attached the testator disposed of a large estate, both real and personal,

to his widow and children. The will and codicils were admitted to probate in this state, the plaintiff being a party to the proceedings for that purpose before the surrogate. By the last codicil the testator disposed of that portion of his property which had been left by the prior provisions of the will to the plaintiff in trust to the defendant to pay the income thereof annually or at convenient intervals in each year to or for the use and support of the plaintiff during his life, and at his death the said trust should cease and the principal and any unpaid portion of the income of the fund was to go and be divided among his heirs at law. By the prior provision of the will and codicils, after providing for the widow, the testator devised the remainder of his estate in substantially equal shares to his children, and thus by the last codicil these provisions as to the plaintiff were changed into a life estate with remainder to the plaintiff's heirs.

The estate was distributed by the executors in conformity with the provisions of this testamentary instrument. An intermediate accounting was had and a final judicial accounting and settlement subsequently, in which full distribution was made according to the terms of the will, and the executors were discharged from their trust. The controversy in this case does not arise from any defect in the will, but from the transactions which took place many years prior to its execution and to the death of the testator. On the 11th of August, 1873, the plaintiff became engaged to be married to a lady who resided and was domiciled at Baden-Baden. The marriage was preceded by the execution of an ante-nuptial contract or settlement made by the plaintiff and his father and mother of the first part, and the intended wife, with her father and mother, of the second part. By this instrument the testator made some gifts of property to the plaintiff, including a house in Paris, but the main provisions of the instrument were obviously intended for the benefit of the wife. The only provision of the instrument that is of any importance in the present controversy is the following:

"And the said James Phalen and Catherine S., his wife, do

further respectively covenant and agree that they will make no distinction between their children as regards the proportion of their estates coming to each under their respective wills; account, however, being taken of any advance which may have been made to either during the lifetime of their said parents, the amount of which advance is in all cases to be deducted from the share to which such child would otherwise have been entitled."

The theory of this action is that inasmuch as the testator left the plaintiff's equal share, not absolutely to him, but in trust as before stated, that the provision of the marriage settlement was violated, and hence conferred upon the plaintiff a right of action for specific performance. The complaint sets out the will and codicil and the other writing referred to, and demands judgment for the following relief: (1) That the trust under the seventh codicil in the fund held for the plaintiff be declared to be created in violation of plaintiff's rights under his contract, and the plaintiff is entitled to the principal of his said fund held by the United States Trust Company. (2) That the trust under the seventh codicil be abrogated, and that the remainders in said fund given by the seventh codicil to the heirs of the plaintiff be extinguished, and that the plaintiff's two sisters, Florence and Catherine, and all other persons who may ever be his heirs at law be barred therefrom, and that it be declared that the United States Trust Company holds that fund under the will as modified by the first six codicils, and (3) that the trust company be directed to turn over all of said fund with the increment thereto and the accumulation thereof to the plaintiff. There are some other statements and exceptions in the prayer, but they have no bearing upon the case. The trust company was the only defendant that appeared in the action and it demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer, but that judgment was reversed by the Appellate Division and the plaintiff has appealed to this court.

The first question that is naturally presented is the legal effect and nature of that provision of the ante-nuptial agreement which has already been quoted. It is impossible, I think, to classify it among any of the recognized methods for the devolution of property or the creation of any particular obligation. It is not a testamentary instrument of any kind, since it was not executed according to the laws that provide for the distribution of property to take effect after death. It was not a conveyance of any property whatever. It created no lien upon any of the testator's estate. It was neither an executed nor an executory contract. It will be seen that fourteen years had elapsed from the time that the marriage agreement was made until the testator executed the seventh codicil of his will, which it is claimed constituted a breach of contract and is clearly the sole reason for this action. If this theory of the case be correct it must follow that had the plaintiff, the son, developed in the meantime habits of extravagance or become otherwise improvident and incapable of taking care of a large estate, a contingency that actually happened, the testator had disabled himself from so changing his will as to make what might seem to him a proper disposition of the plaintiff's share under all the circumstances. It is argued that the testator, fourteen years before he executed the codicil, had so bound himself hand and foot that he was not at liberty to make what he thought to be a wise disposition of his property, simply because of his promise in the marriage agreement to make no distinction between his children. This proposition would seem to be so plainly contrary to good sense and to all our notions of law that the mere statement of it is sufficient to show its absurdity. Indeed, it is not attempted to sustain this action upon any principle of law or equity, or by arguments founded upon any rule of law or equity. What is claimed is simply this, that there are to be found among the adjudicated cases remarks to that effect by learned judges in the discussion of cases, but where, it will be seen, the question now before us was not involved. It is perfectly safe to say that in no case has it yet been decided that a man

who made a promise such as that contained in this case has disabled himself forever from making such a disposition of his property by will as seemed to him to be wise and judicious. A brief review of the cases cited in support of the complaint in this action will, I think, show that when they are fairly considered and analyzed they decide nothing that sustains the plaintiff in this case. The discussion in the opinions may be omitted. It will be sufficient to point out the questions that were actually involved and decided in the particular case.

The leading case cited and relied upon by the learned counsel for the plaintiff is that of *Parsell v. Stryker* (41 N. Y. 480). In that case a person let a farm to his grandson for the life of the former. The tenant was bound to occupy the place and do all the work and was to have two-thirds of the produce and the farm was to belong to the grandson on the death of the grandfather. It was subsequently agreed that the grandfather should make a will devising the farm to the grandson. It was held that an action for specific performance would lie for the performance of this agreement. Here the grandson went into possession and occupancy of the farm under a promise that it should belong to him at the death of the grandfather. The court decreed specific performance and the conveyance to the grandson by the defendants in the action, to whom it had been subsequently conveyed by the grandfather in violation of the agreement. That case has little, if any, bearing upon the case at bar. The fact that the grandson, on the faith of the promise, went into possession and occupancy of the farm and worked it, yielding a portion of the products to the lessor, was sufficient to confer upon a court of equity jurisdiction to decree specific performance. The promise to leave the farm to the grandson by will was of no consequence. A verbal agreement to give it upon the death of the owner would be sufficient when accompanied by possession. In fact, that is just what was decided in the case of *Freeman v. Freeman* (43 N. Y. 34). In a court of equity the grandson's case was just as strong without any promise to make a will as it was with a promise.

N. Y. Rep.] Dissenting opinion, per O'BRIEN, J.

That was a circumstance wholly immaterial to the right of action. It was the possession and occupancy of the farm by the grandson under a promise that his grandfather would give it to him that constituted the equitable claim of the plaintiff, and so it will be seen that the case decides nothing that can aid the plaintiff here.

Edison v. Parsons (155 N. Y. 555), cited in behalf of the plaintiff, was a controversy arising out of an alleged agreement between sisters to make mutual wills. On the trial the complaint was dismissed and the judgment was affirmed in this court. The case decides nothing that bears upon the nature or legal effect of the promise, which is the foundation of this action.

In *Winne v. Winne* (166 N. Y. 263) there was an agreement between the mother of a boy and the deceased. The deceased was to have, and the mother of the plaintiff was to surrender to her the custody and control of the plaintiff. The deceased was to maintain him as her own child, and at her death give him all her property and make him her sole heir, and his mother was to have nothing more to do with him. This agreement was completely carried out and executed, but the deceased died intestate, and the boy, or his representatives, claimed the property owned by the deceased at her death. The latter left no father, mother, child nor descendant, and no child was born to her after such contract was made. The court decreed specific performance so far as to declare that the property belonged to the plaintiff. This court, however, was careful to add at the end of the opinion this paragraph: "While we are of the opinion that specific performance of this contract was properly awarded, this decision is based solely upon the findings of the trial court and the particular facts and circumstances of this case. Yet, it must not be regarded as an authority for maintaining such an action under different circumstances or upon other proof, as the granting or denial of such relief always rests in the sound discretion of the court, and should be denied unless the agreement is fair and just, and its enforcement equitable." It is

hardly necessary to add that in the case at bar it is sought to maintain the action under very different circumstances, and under the language of the opinion just quoted it can have no application to this case. These are the cases cited in behalf of the plaintiff from this court. There are numerous cases cited from the Supreme Court which call for a brief review.

Shakespeare v. Markham (10 Hun, 311) assumed the form of an accounting before the surrogate to recover from the estate of a deceased person a large sum of money claimed to be due the contestant for services rendered and for taking care and for supporting the testator in his old age under an expectation of receiving a legacy from him. The testator died without having made any testamentary provision in favor of the contestant. In the Surrogate's Court the claim was allowed, but the determination was subsequently reversed upon appeal and the reversal was affirmed in this court. (72 N. Y. 400.) Just why that case is supposed to be an authority in favor of the plaintiff in the case at bar it is quite difficult to see.

Colby v. Colby (81 Hun, 221) was a case where there was a mutual promise of marriage between the parties, and the learned trial judge held that it was an authority in support of this action. It is stated in the case that the deceased made a proposition of marriage, which she accepted, and that thereupon an agreement in writing was made and subscribed by the parties, by the terms of which it was mutually agreed that the two should be presently married, and that the plaintiff should live with the defendant at his residence and be a faithful and loving wife to him as long as he should live, and if the plaintiff should survive him she should have the said premises as her own in fee simple absolute; and that in pursuance of the terms of said contract and in part performance of said agreement the said Colby executed and published his will in due form of law by which he devised to the plaintiff, her heirs and assigns forever, the whole of said premises, and he agreed that he would not revoke or alter the will. The marriage took place according to this agreement and the parties lived together

N. Y. Rep.]

Dissenting opinion, per O'BRIEN, J.

as husband and wife until the death of the husband on the 10th day of March, 1894. Now, here was an agreement in the nature of an ante-nuptial settlement between husband and wife, whereby the wife was to have in case she survived her husband certain specific real estate. It appeared that the husband, before his death, executed and published another and different will, whereby he undertook to revoke the one made prior to the marriage. It appeared that the widow was in possession of the premises, claiming to be the owner under the contract and demanded specific performance. It was held that she had a good cause of action, but it is obvious that the promise not to revoke the will had little, if anything, to do with her rights. The ante-nuptial agreement followed by the marriage, and the possession by the wife after her husband's death, gave her an equitable claim to the property which a court of equity would, of course, enforce. Suppose the husband had not revoked the will at all, but it had been set aside by reason of some defect in the execution or of undue influence or incapacity or other cause; this would not affect the rights of the wife in the slightest particular. She would still, in virtue of the marriage contract and the marriage and her possession, have good title in a court of equity. So that we see that the promise not to revoke the will was in legal effect wholly immaterial. The case furnishes no support for the present action. Other cases cited upon the brief of the plaintiff's counsel are equally wide of the mark. None of them decide anything that tends to sustain the plaintiff in this case. It is said, for instance, that the case of *Johnston v. Spicer* (107 N. Y. 185) sustains the plaintiff's contention. I am unable to see that it has any application whatever. The proposition decided in that case was this: Ante-nuptial contracts intended to regulate and control the interest which *each of the parties to the marriage* shall take in the property of the other during coverture or after death are favored by the courts and will be enforced in equity according to the intention of the parties. No one disputes that proposition. But there is no question in this case between the parties to the marriage.

There is no question here with respect to any property as between the husband and wife. The sole question here is whether there was a valid contract between the father and the son, whereby the father bound himself not to make the codicil in question; whether there was a breach of the contract, and if there was, whether the plaintiff's remedy is by action for damages or suit for specific performance.

On the other hand there are three or four quite recent cases in this court that seem to me to be squarely against the plaintiff's contention. In *Gall v. Gall* (64 Hun, 600) a deceased person had promised that if the plaintiff, then residing in California, would go to live with him in New York he would make a will in his favor. The deceased did make the will, but afterwards he married again and had issue. The action in that case, as in this, was for specific performance, and it was held that it could not be maintained, and that judgment was affirmed in this court. (138 N. Y. 675.)

Mahaney v. Carr (175 N. Y. 454) was a case that in its main features cannot be distinguished from the one at bar. It was an action by a grandchild against the representatives of her grandfather to compel the specific performance of an agreement that if the girl would make her grandfather's home her home and assume the duties of a daughter the deceased would give to her a child's share of his property upon his death, to wit, a one-fourth interest. The courts below sustained the action, but it was reversed in this court upon an opinion which seems to me to answer the argument of the learned counsel for the plaintiff in this case.

Ide v. Brown (178 N. Y. 26) is to the same effect. In that case the plaintiff, a young girl, whose father and mother had died, brought an action to enforce specific performance of an agreement on the part of the deceased to make a will in her favor vesting her with the title to a large amount of real and personal property. It was held that the action could not be maintained. Thus, it will be seen that instead of judicial authority to support this action the decisions of the courts are against it. It can, I think, be safely asserted that there is no

case in this state that decides that a promise such as the plaintiff relies upon in this case can be made the subject of specific performance in a court of equity or even of an action at law.

But perhaps the most conclusive argument and authority against the plaintiff's contention is to be found in the history of this very case. It seems that after the probate of the will and codicil the plaintiff filed a petition with the surrogate of New York to revoke the last codicil on the ground of fraud and undue influence.

The question of the validity of this codicil was tried at great length before the surrogate, and he held that the codicil was valid and dismissed the petition. On appeal to the Supreme Court the question was again fully argued and heard and that court unanimously affirmed the decree of the surrogate. An appeal was taken to this court and the decision of the courts below was unanimously affirmed *on the opinion below*. (*Matter of Phalen*, 47 N. Y. S. R. 44; *affd.*, 140 N. Y. 659.) The court found, as will be seen from the opinion, that the plaintiff had separated from his wife and was incompetent to manage property by reason of bad habits. All this took place nearly fifteen years ago, and several years after the father's death. Now, if it be true, as asserted upon this appeal, that the father had bound himself by a valid contract between himself and the plaintiff not to make the codicil in question, and it was made in violation of the rights of the son, it was, as between the son and the estate, simply invalid and void and should have been canceled and revoked. The legal effect of the decision is that the testator had the right and the power to make the codicil which constitutes the sole complaint of the plaintiff, and the testamentary power and capacity of the father was in no wise restricted in law by anything contained in the so-called contract upon which the present action was based. It cannot be supposed that this court and the court below would declare valid a testamentary instrument made in violation of a binding contract. The question then before the court is the same question now presented, namely, the right of the father to alter his will and make such

disposition of his property as he thought best, and it cannot be doubted that he acted wisely in thus protecting the son from the result of his own improvidence. It would, in our judgment, be very unwise to reopen the controversy now, fifteen years after it had been settled by the court and after the estate had been distributed and the executors discharged. The case in its general aspects does not seem to be so meritorious as to warrant such a result, and I venture to say that not a single case can be found in this state where such an action was sustained. If the testator had, by his promise in the marriage contract, disabled himself from changing his will, then why, it may be asked, did this court hold the last codicil valid?

Passing from the question of the nature and validity of the promise in question, there are two other points that should be stated. If the promise set out in the complaint is a contract or binding obligation, it certainly must be supported by a sufficient consideration. It was a promise, in substance, that if the deceased made a will at all, it should be in a particular form, based upon the principle of equality between his children. Now, what consideration was there for the promise moving from the son to the father? It is said that marriage is a good consideration; and so it is between the parties, but it does not follow that it is a consideration for the promise of third parties. What did the son give the father that would constitute a consideration for the promise? Nothing whatever. It is true that he afterwards married, but his father never requested him to marry and he never promised his father that he would. That was the plaintiff's own voluntary act. Did the plaintiff suffer any detriment in consequence of his father's promise? Certainly not, unless we are prepared to hold that it is a detriment to a young man to marry, sufficient in the eye of the law to form a consideration for a promise on the part of another. I assume that that proposition will meet with no favor from any direction. The deceased secured no benefit, pecuniary or otherwise, from the promise on his part, and the question returns again, what was the consideration

moving from the son to the father that supports this promise which is called a contract? If the son had refused to marry and the father had sued him for specific performance, of course, such an action would be absurd, and yet a court of equity will not enforce a promise unless it is mutual. Both parties must be bound, and if both are not bound neither is bound. Consideration is the important element of a contract and must not be confounded with motive, which is not the same thing as consideration. The latter means something which is of value in the eye of the law moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant. It is the price or matter of inducement to the contract, whether it be the compensation that is paid or the inconvenience that is suffered by the party from whom it proceeds. (Bouv. Law Dict. 401.) Chancellor KENT thus defined consideration: "There must be something given in exchange, something that is mutual or something which is an inducement to the contract, and it must be a thing which is lawful and competent in value to sustain the assumption." (2 Kent's Com. 464.) So that the promise in this case is not supported by any consideration, and hence the deceased had the right at any time before his death to make such a disposition by will of his property as he thought best.

This is an action in equity. The character of the action is stamped by the relief demanded, and that has already been stated. Unless the complaint states facts sufficient to invoke the jurisdiction of equity, then it does not contain a good cause of action. The rule in such cases is this, "in case a plaintiff has the right to maintain an action at law, or a suit in equity, and he elects to bring a suit in equity, demanding only equitable relief, but fails to state sufficient facts in his complaint to constitute an equitable cause of action, and the defendant demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action, the demurrer will be sustained, though the facts alleged are sufficient to constitute a legal cause of action; and so, in case he elects to bring an action at law, demanding only legal relief,

but fails to state sufficient facts in his complaint to constitute a legal cause of action, and the defendant demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action, the demurrer will be sustained, though the facts alleged are sufficient to constitute an equitable cause of action." (*Wisner v. Consolidated Fruit Jar Co.*, 25 App. Div. 362; *Edson v. Girvan*, 29 Hun, 422; *Swart v. Boughton*, 35 Hun, 281; *Willis v. Fairchild*, 19 J. & S. 405; *Fisher v. Charter Oak Life Ins. Co.*, 20 J. & S. 179; *O'Brien v. Fitzgerald*, 143 N. Y. 377.)

This must be the true rule in such cases, since by section 1207 of the Code, where the defendant does not answer, the plaintiff can have no judgment except that demanded in the complaint. The facts stated in the complaint in this case relate exclusively to the breach of an alleged contract between the plaintiff and his father. If, therefore, the plaintiff has any cause of action whatever, it is an action at law to recover damages for the breach. There are no facts stated that bring the case within the jurisdiction of any recognized department of equity. So that, in whatever aspect the case is considered, it must be held that the demurrer was well taken, and that the judgment should be affirmed, with costs.

CULLEN, CH. J., WILLARD BARTLETT and HISCOCK, JJ., concur with WERNER, J.; O'BRIEN, J., reads dissenting opinion, and HAIGHT and VANN, JJ., concur in result thereof.

Ordered accordingly.

In the Matter of the Application of GEORGE W. MORGAN, as State Superintendent of Elections for the Metropolitan Elections District, Respondent, to Strike from the Register of Electors the Name of PATRICK FUREY, Appellant.

1. CONSTITUTIONAL LAW — HOME RULE PROVISIONS NOT APPLICABLE TO NEW OFFICES — STATE SUPERINTENDENT OF ELECTIONS. The purpose of the so-called home rule clauses of the Constitution (Art. 10, §§ 1, 2) was to preserve to the people of the local divisions of the state the power to select such local officers as they had theretofore selected, but not to

N. Y. Rep.]

Statement of case.

give them the right to select new officers, even if their duties are local, providing their functions are new and the functions of existing officers are not interfered with.

2. STATE SUPERINTENDENT OF ELECTIONS — OFFICE NEW IN NAME AND FUNCTIONS. The office of state superintendent of elections created by the Metropolitan Elections District Law (L. 1898, ch. 676; L. 1905, ch. 689) is new in name and essentially new in functions; the legislature, therefore, was authorized to provide for appointment of its incumbent by the governor instead of by some local authority and the law in that particular is a valid exercise of legislative power.

Matter of Morgan v. Furey, 114 App. Div. 127, affirmed.

(Argued October 1, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 21, 1906, which affirmed an order of Special Term granting an application to strike the name of Patrick Furey from the register of electors.

The facts, so far as material, are stated in the opinion.

R. Burnham Moffat for appellant. The duties imposed and the powers conferred by the act upon the state superintendent and his deputies are those of existing offices which the Constitution prescribes may be filled only by the vote of the electors or upon appointment by the authorities of the locality affected. (*Warner v. People*, 2 Den. 272.) The act does not create a "new" office within the meaning of the Constitution, so as to permit the same to be filled by central authority. (*People v. Draper*, 15 N. Y. 532; *People v. Pinckney*, 32 N. Y. 377; *People v. Raymond*, 37 N. Y. 428; *Met. Bd. of Health v. Heister*, 37 N. Y. 661; *People v. Albertson*, 55 N. Y. 50; *Matter of Brenner*, 170 N. Y. 185; *Matter of Allison v. Welde*, 172 N. Y. 421; *People ex rel. M. S. Ry. Co. v. Tax Comrs.*, 174 N. Y. 417; *Warner v. People*, 2 Den. 272.) The creation of an artificial district or division of the state for the purpose of vesting in a state official the functions and duties of an office which the Constitution prescribes shall be filled only by the locality, is an unlawful assumption of power by

the legislature. The legislature cannot do indirectly what the Constitution prohibits it from doing directly. (*Draper Case*, 15 N. Y. 532; *People v. Pinckney*, 32 N. Y. 377; *People v. Shepard*, 36 N. Y. 285; *Bd. of Health v. Heister*, 37 N. Y. 661; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *People v. Raymond*, 37 N. Y. 428; *Rathbone v. Wirth*, 6 App. Div. 277; *People ex rel. Devery v. Coler*, 173 N. Y. 103; *Matter of Brenner*, 170 N. Y. 190; *Matter of Allison v. Welde*, 172 N. Y. 426.)

Julius M. Mayer, Attorney-General (Danforth E. Ainsworth of counsel), for respondent. The legislature had the power to create this election district, and the act creating the same is constitutional. (*People ex rel. Wood v. Draper*, 15 N. Y. 532; *People v. Pinckney*, 32 N. Y. 377; *People ex rel. McMillan v. Shepard*, 36 N. Y. 285; *People ex rel. Taylor v. Dunlap*, 66 N. Y. 162; *Board of Excise v. Barrie*, 34 N. Y. 657; *People ex rel. Henderson v. Bd. of Suprs.*, 147 N. Y. 1; *People ex rel. M. S. Ry. Co. v. Tax Comrs.*, 174 N. Y. 417.)

VANN, J. This proceeding was commenced by an order requiring one Patrick Furey to show cause before a Special Term of the Supreme Court why his name should not be stricken from the register of electors of the 34th election district of the 32nd assembly district of the county of New York. Upon the return day of the order to show cause the application was granted and an appeal was thereupon taken to the Appellate Division, which affirmed the action of the lower court, one of the justices dissenting. The order of affirmance is now before us for review and the only question which the parties ask us to decide, all others having been expressly waived, is whether the Metropolitan Elections District Law violates the home rule provisions of the Constitution. The first statute relating to the subject was passed in 1898, but the amended act of 1905, which is a re-enactment with changes and additions, is the one now in force. (L. 1898,

ch. 676; L. 1905, ch. 689). The provisions of the Constitution involved are sections one and two of article ten, which relate to what is known as "home rule."

The act creates "a metropolitan elections district for the purpose of all elections for state officers," composed of the counties of New York, Kings, Queens, Richmond and Westchester. The governor is required to appoint an officer "to be known as 'the state superintendent of elections for the metropolitan elections district.'" That officer is authorized to appoint deputies, the same number from each political party, who, by his direction or on their own motion or on complaint of any citizen of the state, may "investigate all questions relating to registration of voters, and for that purpose * * * have power to visit and inspect any house, dwelling, building, inn, lodging-house or hotel within the metropolitan district and interrogate any inmate, house-dweller, keeper, caretaker, owner, proprietor or landlord thereof or therein as to any person or persons residing or claiming to reside therein or thereat." A deputy may "arrest any person without warrant who in his presence violates or attempts to violate any provision of the election law or the penal code relating to crimes against the elective franchise." He may "execute warrants of arrest and take into custody the person or persons named in such process; inspect and copy any books, records, papers or documents relating to or affecting the election or registration of electors," and "require every lodging-house keeper, landlord or proprietor to exhibit his register of lodgers therein at any time." The state superintendent is given power to issue subpoenas "for the purpose of investigating any matter within his jurisdiction and aiding him in enforcing the provisions of" the act; to administer oaths and take depositions "in all matters pertaining or relating to the elective franchise," and with his deputies to attend elections, an equal number from each of the leading political parties being assigned to each polling place, and "during the election to preserve order and arrest any person violating or attempting to violate the" laws relating to registration and

elections. It is made the duty of lodging-house and hotel-keepers in the metropolitan elections district to keep a register of the names and residences of their guests and the date of their arrival and departure, with a description of the physical peculiarities, place of nativity, occupation and place of business of each. The superintendent may require the chief of police and the heads of the building, fire and health departments to make certain reports to aid him in enforcing the laws passed to prevent fraudulent voting. The boards of inspectors of each election district are required to report to the police at the close of each day's registration the name of each person enrolled, and the police are required to forthwith deliver the same to the state superintendent at his office. The superintendent and his deputies are clothed with the powers of peace officers for the purposes of the act. All salaries and other expenses of carrying the act into effect are paid by the state, and the superintendent is required to make an annual report to the governor of various facts relating to the administration of his office. The act contains other provisions which set forth in great detail the means and method by which the superintendent is empowered to investigate the right to registration of persons whose names appear upon the registry, but enough has been stated to show the general purpose of the statute.

The only question now before us for decision is whether this act violates the principle of home rule as embodied in the Constitution. Whether certain provisions thereof infringe upon personal rights, or encroach upon the Constitution in any respect other than the single one named, are withdrawn from our consideration by the action of the parties.

The particular in which it is claimed that the statute violates the Constitution is through the power conferred upon the governor to appoint the state superintendent instead of requiring his appointment by some local authority. The superintendent, however, is not named in the Constitution, and the essential, as contrasted with the incidental functions of that officer, were unknown when the Constitution was adopted.

The office is new not only in name, but in the nature of the powers and duties belonging thereto, and, hence, according to the express command of the fundamental law, may be filled through an election by the people or appointment by such authority "as the legislature may direct." The state superintendent might with propriety be called the investigator of registration, for the primary object of the office is to investigate the right of persons enrolled as electors to be registered and to vote at any state election. He may be regarded as an agent of the state with reference to a subject of general interest to the state. His powers and duties are limited to the investigation and prevention of fraud in registering and voting throughout a large district, where the evil is hard to contend with owing to the extensive floating population and the frequent changes of residence. General supervision through a well-equipped central office by an officer who has in view the names and a personal description of all who are registered at the various polling places throughout the entire district, would naturally lead to discoveries beyond the power of the most diligent election officer with only a limited territory under observation. He is able to make investigations, compare records and apply tests previously unknown, because he has before him the entire registration of the most populous part of the state. This power is purely original, for it had never been exercised before. No right, power or emolument is taken from any local officer and conferred upon the superintendent or his deputies; and while they are authorized to exercise certain powers belonging to existing officers, it is only for the purpose of aiding them in executing their main powers. The power to investigate all questions relating to the registration of voters throughout five counties, and for that purpose to visit and inspect hotels and lodging houses, and to interrogate the inmates and proprietors as to the residence of persons claiming to reside therein; to require landlords to exhibit their register of lodgers; to inspect and copy books and papers relating to the registration of electors; to issue subpoenas and make examinations under oath with reference to matters

relating to the elective franchise; to require sworn statements from all who keep hotels and houses of entertainment, naming and identifying by description all persons who claim a voting residence therein; to require reports from all officers whose duties make them familiar with the places where people live, and other powers of like nature, are new and characterize the office as new, with functions and purposes unknown prior to the passage of the act. Such powers had never been conferred upon any officer before, and hence the legislature was authorized by the Constitution to provide for the appointment of the state superintendent by the governor. (*People ex rel. Metr. St. Ry. Co. v. State Bd. of Tax Comrs.*, 174 N. Y. 417.) It is unnecessary to review the authorities, for they are all reviewed in the case cited, which is the latest general expression by this court of its views upon that part of the Constitution now under consideration. Mr. Lincoln's valuable History of the Constitution may be consulted to advantage by any one who wishes to make an exhaustive examination of the subject. (Vol. 4, p. 733.)

The validity of the act does not depend upon the creation of a new civil division embracing several counties, for it would be valid had it been limited to the city of New York or the county of Queens. The powers and duties of an officer may be purely local, but if the office is new in object and function it need not be filled by local authority. The purpose of the Constitution was to preserve to the people of the local divisions of the state the power to select such local officers as they had theretofore selected, but not to give them the right to select new officers even if their duties are local, providing their functions are new and the functions of existing officers are not interfered with. (*Matter of Brenner*, 170 N. Y. 185; *Matter of Allison v. Welde*, 172 id. 421.) These cases show how the Constitution affects local offices under varying circumstances. In the *Brenner* case the act was adjudged invalid because there was an existing officer in the county of Kings who exercised the powers of commissioner of jurors which was, therefore, not a new office. In the

N. Y. Rep.]

Statement of case.

Allison case there was no existing officer in the county of New York who exercised the powers of commissioner of jurors which was hence held to be a new office, and the act was sustained.

We think the statute, so far as challenged upon this appeal, is a valid exercise of legislative power and the order appealed from should, therefore, be affirmed.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Order affirmed.

JACOB RICHMAN, Respondent, v. CONSOLIDATED GAS COMPANY OF NEW YORK, Appellant.

NEW YORK CITY — GAS COMPANIES — UNITED STATES CIRCUIT COURT INJUNCTION RESTRAINING THE ENFORCEMENT OF EIGHTY CENT GAS ACT (L. 1906, CH. 125) NO BAR TO ACTION IN STATE COURT BY CONSUMER RESTRAINING GAS COMPANY FROM CUTTING OFF GAS — PRINCIPLE OF COMITY NOT APPLICABLE. An injunction issued by the Circuit Court of the United States in a suit by the Consolidated Gas Company of the city of New York to determine the constitutionality of chapter 125 of the Laws of 1906 fixing the maximum price of gas in that city at eighty cents per 1,000 feet, alleged to be invalid as in contravention of the 14th amendment of the United States Constitution and of section 10 of article 1 thereof, and to restrain the enforcement of the provisions of the statute, does not prevent the maintenance of an action in the Supreme Court of this State by a consumer not a party to the former suit, to restrain the gas company from cutting off the gas from his premises for failure to pay the rate authorized before the enactment of the statute, where, although the injunction of the United States court permitted such rate to be charged, the difference to be paid into court to await the determination of the controversy, it contained no provision requiring a consumer to pay the former rate or to refrain from defending any action to recover that amount or from maintaining any action to prevent the company from enforcing payment by cutting off gas from his premises; an injunction order in such action granting the relief sought is not in conflict with that issued by the United States court, and there is nothing in the principle of comity prohibiting the state court from entertaining jurisdiction to the extent of granting it.

Richman v. Consolidated Gas Co., 114 App. Div. 216, affirmed.

(Argued October 5, 1906; decided October 16, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 26, 1906, which reversed an order of Special Term denying a motion for an injunction *pendente lite* and granted such motion.

The questions certified are :

1. Whether or not the Supreme Court has jurisdiction to entertain this action ?

2. Whether or not, if the Supreme Court did have jurisdiction to entertain this action, it ought to have entertained jurisdiction in view of the principle of comity ?

The facts, so far as material, are stated in the opinion.

Joseph H. Choate and *John A. Garver* for appellant. The Supreme Court of New York did not have jurisdiction to entertain these actions. (*Sharon v. Terry*, 36 Fed. Rep. 337; *Wallace v. McConnell*, 13 Pet. 136; *Suydam v. Broadnax*, 14 Pet. 67; *Payne v. Hook*, 7 Wall. 425; *McKim v. Voorhies*, 7 Cranch, 279; *Ableman v. Booth*, 21 How. [U. S.] 5, 6; *Riggs v. Johnson County*, 6 Wall. 166; *Amy v. Supervisors*, 11 Wall. 136; *Mayor v. Lord*, 9 Wall. 409, 414; *Supervisors v. Durant*, 9 Wall. 415; *Tarble's Case*, 13 Wall. 397; *French, Trustee, v. Hay*, 22 Wall. 250; *C. N. Bank v. Stevens*, 169 U. S. 432; *Beardslee v. Ingraham*, 183 N. Y. 411; *Opelika v. Daniel*, 59 Ala. 211; *Prugh v. P. S. Bank*, 48 Neb. 414.) The Federal court, having first acquired jurisdiction of the entire controversy, the state court will not be permitted to assume jurisdiction subsequently. (*Peck v. Jenness*, 7 How. [U. S.] 612; *Freeman v. Howe*, 24 How. [U. S.] 450; *Buck v. Colbath*, 3 Wall. 334; *Riggs v. Johnson County*, 6 Wall. 166; *U. S. v. Keokuk*, 6 Wall. 514; *Taylor v. Taintor*, 16 Wall. 366; *Heidritter v. E. O. C. Co.*, 112 U. S. 294; *Covell v. Heyman*, 111 U. S. 176; *R. G. R. Co. v. Gomila*, 132 U. S. 478; *Matter of Tyler*, 149 U. S. 164, 186; *Harkrader v. Wadley*, 172 U. S. 148.) The Supreme Court should have declined to entertain jurisdiction on the ground of comity. (*Howell v. Mills*, 53 N. Y. 322;

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

People ex rel. G. L. Co. v. Common Council, 78 N. Y. 56; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Matter of Waite*, 99 N. Y. 433; *Matter of Paquete Habana*, 175 U. S. 677; *Triquet v. Bath*, 3 Burr. 1478; *People v. Martin*, 175 N. Y. 315; *Stoddard v. Lum*, 159 N. Y. 265; *Howarth v. Angle*, 162 N. Y. 179; *Lozier v. Westcott*, 26 N. Y. 146.)

Clarence J. Shearn for respondent. The pendency of the suit in the Federal court neither deprives the Supreme Court of the state of New York of jurisdiction nor justifies that court on any principle of comity in refusing to grant the relief prayed for. (*Lothrop v. Steadman*, 13 Blatchf. 134; *Deering v. York*, 31 Maine, 172; *San Diego v. California*, 174 U. S. 754; *Ball v. Tompkins*, 41 Fed. Rep. 486; *Matter of Hall v. Stilson Co.*, 73 Fed. Rep. 527; *Heidritter v. E. O. C. Co.*, 112 U. S. 294; *Crescent City v. Butchers*, 12 Fed. Rep. 225; *Briggs v. Stroud*, 58 Fed. Rep. 717; *Andrews v. Smith*, 5 Fed. Rep. 833; *Peck v. Jenness*, 7 How. [U. S.] 612.)

HAIGHT, J. The defendant is a corporation engaged in the business of manufacturing gas and conducting and supplying the same to consumers in the city of New York. The plaintiff occupies a room in No. 484 Sixth avenue in said city, and is a consumer of gas furnished by the defendant. Prior to the first day of May, 1906, the maximum price which the defendant was authorized to charge such consumer was one dollar per thousand cubic feet, but after that date the maximum price which it was permitted to charge was reduced to eighty cents per thousand cubic feet by order of the gas commission and by the provisions of chapter 125 of the Laws of 1906. Thereafter the defendant rendered to the plaintiff a bill for the gas consumed by him for the month of May at the rate of one dollar per thousand cubic feet, which he refused to pay, but tendered to the defendant the amount of such bill at eighty cents per thousand cubic feet. This amount the defendant refused to accept, and then threatened to cut off the gas from the plaintiff's premises and remove

the meter therefrom. Thereupon this action was brought to restrain the defendant from so cutting off the gas from the plaintiff's premises and refusing to continue to supply him therewith, and an injunction *pendente lite* was granted in accordance with his prayer for relief, which is now brought up for review.

It appears that prior thereto a bill of complaint was filed on behalf of the defendant company as complainant in the Circuit Court of the United States, in which the attorney-general of the state, the district attorney of the county of New York, the city of New York and the gas and electricity commission of the state were made parties defendant, in which the complainant prayed for judgment that the statute of the state creating the gas commission, and that of chapter 125 of the Laws of 1906, fixing the maximum price of gas at eighty cents per thousand cubic feet, be decreed to be illegal and void as in contravention of the fourteenth amendment of the Constitution of the United States and of section ten, article one, thereof, and that pending the final determination of that action an injunction was issued restraining the defendants from attempting to enforce the provisions of the statute in the meantime.

Much has already been written upon the subject, by the circuit judge, the Special Term and Appellate Division justices, and we recognize the fact that the questions involved in the litigation are of great importance; but in view of the fact that the rights of the parties depend upon the questions of the constitutionality of the acts alluded to and that those questions will have to be ultimately determined by the Supreme Court of the United States, we have thought it advisable to refrain from any general discussion of the questions that may be involved and to confine ourselves to a statement of the grounds upon which we base our answers to the questions certified.

The filing of the bill in the Circuit Court of the United States by the Consolidated Gas Company, undoubtedly, gave that court jurisdiction to finally determine the constitutionality of

the acts complained of ; but the mere filing of the bill did not operate to suspend the provisions of the statute pending the final adjudication by that court as to the constitutionality of the acts. We are, therefore, called upon to examine the injunction that was issued pending the trial of the case for the purpose of determining how far the officers of the state, the municipality and the consumers of gas are affected by its provisions. By referring to the provisions of the injunction we find that the officers of the state and the municipality, who were made parties to the action, are first enjoined and restrained from in any way enforcing or attempting to enforce the provisions of the acts referred to until the final adjudication upon the trial of the case. The learned circuit judge then provides that the gas company may make the same charges for gas to its consumers as it was authorized theretofore to charge, and that, as to the payments made thereon, twenty cents per thousand cubic feet should be paid into court and deposited in a bank specified, there to remain until the rights of the company and the consumers were finally determined. There is no provision in the injunction which requires the consumers to pay one dollar per thousand cubic feet for the gas used by them, or to refrain from defending any action that should be brought against them to recover that amount, or from maintaining any action to prevent the gas company from enforcing the payment of such amount by cutting off the gas from their premises. Indeed, the learned circuit judge, in his opinion granting the injunction *pendente lite*, construes its provisions and expressly states that "as between the consumer and the manufacturer it left the question as to what the former should pay the latter precisely where it stood before. Any consumer who might be asked to pay the old rate was left by the order entirely free to decline to pay it and to make a tender at the new rate for the gas he had consumed. * * * The individual consumer was not a party to the suit and had not been served with process. In the case of a consumer who, upon demand, chose to pay the old rate, the order provided that the company should not cover the

twenty cents difference into its treasury, but should leave it impounded under the direction of the court so as to fully insure its return to the person paying the same in the event of the company's failing to succeed in its litigation. In the case of the consumer who chose to make tender at the new rate and to stand upon whatever rights were secured to him by the action of the gas commission in fixing that rate and by the action of the legislature in establishing the same rate, the order left him entirely free and untrammelled to apply for such relief as the law afforded him in the event of the company's seeking to compel payment of the difference." That the gas company so understood and construed the injunction order is apparent from the fact that the company moved to extend the terms of the injunction so as to enable the company to collect the twenty cents difference by summary measures from such consumers, such as by refusal to supply them with gas, which motion the Circuit Court judge refused. We conclude, therefore, that the injunction order issued in this action is not in conflict with that issued in the action pending in the United States court, and that the Supreme Court of this state had jurisdiction to entertain this action, and that there is nothing in the principle of comity that prohibits the state court from entertaining jurisdiction to the extent of granting the injunction in this case.

As to whether the Circuit Court could, or should, enjoin the consumers from bringing actions in the state courts, is a question for the Federal courts to determine. In this action the plaintiff has secured through the injunction issued his right to receive, or be furnished, gas during the pendency of the action. The defendant is protected in its right by the undertaking which has been given to pay it the damages which it may sustain by reason of the injunction. Inasmuch as the Circuit Court had previously obtained jurisdiction to determine the constitutional questions involved, it may be that our Supreme Court, in case that action is prosecuted with diligence, should stay the trial of this action until the determination of that court of the issues in that action, but

N. Y. Rep.]

Statement of case.

that question involves the discretion of the Supreme Court, and should be determined by it.

The order appealed from should be affirmed, with costs, and the questions certified answered to the effect that the Supreme Court has jurisdiction and that there is nothing in the principle of comity that prohibits it from entertaining jurisdiction.

CULLEN, Ch. J., EDWARD T. BARTLETT, VANN, WEBNER, WILLARD BARTLETT and CHASE, JJ., concur.

Order affirmed.

IN the Matter of the Election of Directors of the WESTCHESTER TRUST COMPANY.

CORPORATIONS — REDUCTION OF NUMBER OF DIRECTORS — STOCK CORPORATION LAW, § 21. A resolution to reduce the number of directors of a stock corporation under section 21 of the Stock Corporation Law (L. 1890, ch. 564, amd. L. 1905, ch. 750) does not take effect until the date of the filing in the proper offices of the transcript of the proceedings of the meeting at which the resolution was adopted; the simple adoption of the resolution is insufficient to reduce the number of directors; nor does a subsequent filing relate back so as to give effect to a resolution not operative of itself.

Matter of Westchester Trust Co., 114 App. Div. 856, reversed.

(Submitted October 2, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 24, 1906, which affirmed an order of Special Term denying an application for a review of the election of directors of the Westchester Trust Company.

The facts, so far as material, are stated in the opinion.

Gerard B. Townsend for appellant. As the term of a class of eight directors expired on the day of the annual meeting, the election of eight persons to fill their places was required, unless the number of directors had theretofore been reduced. (L. 1904, ch. 607, § 161.) The vote at the annual

meeting to reduce the number of directors did not become effective until the transcript of the proceedings of such meeting, duly verified, was filed in the offices of the county clerk and superintendent of banks, where the original certificate incorporating the company had been filed. (L. 1905, ch. 750, § 21; *Matter of D. E. L. & P. Co.*, 160 N. Y. 500.)

Ralph E. Prime, Jr., for respondent. The petition in the case at bar absolutely fails to state or allege a single fact tending to show that the proceedings complained of are illegal, or that any necessary step to accomplish a valid reduction in the number of directors was omitted or defectively performed, or that any statutory provision was violated. (L. 1892, ch. 687; *Wallace v. Walsh*, 125 N. Y. 26.)

WILLARD BARTLETT, J. This is a proceeding to establish the election of the appellant as a director of the Westchester Trust Company. It was instituted under section 27 of the General Corporation Law (Laws of 1890, chap. 563), which reads as follows: "The supreme court shall, upon the application of any person or corporation aggrieved by or complaining of any election of any corporation, or any proceeding, act or matter touching the same, upon notice thereof to the adverse party, or to those to be affected thereby, forthwith and in a summary way, hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and establish the election or order a new election, or make such order and give such relief as right and justice may require." This provision is derived from 1 Revised Statutes 603, section 5, of which it is a substantial re-enactment. (*Matter of Syracuse, Chen. & N. Y. R. R. Co.*, 91 N. Y. 1; *Matter of Petition of Argus Co.*, 138 N. Y. 557.)

In January, 1906, the directors of the Westchester Trust Co. undertook to decrease the number of directors of that corporation from twenty-five to twenty by the method prescribed in section 21 of the Stock Corporation Law (Laws of 1890, chap. 564, as amended by Laws of 1905, chap. 750). A

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

meeting of the stockholders was duly called pursuant to the requirements of that section, and at such meeting, which was held on January 17th, 1906, a resolution was adopted providing for a reduction of the number of directors to twenty. If this resolution became effective immediately upon its adoption there would have been only five directors then to be elected for a term of three years each; whereas, if it did not take effect until the filing of a transcript of the proceedings in the offices where the original certificates of incorporation were filed, it would have been the duty of the stockholders to choose six directors for a three years' term. Votes were actually cast for six directors. Five of them received over two thousand votes each, while the appellant, who was the only other person voted for, received 158 votes, these being cast by a representative holding his proxy. The contention of the respondent is that the votes cast for the appellant must be disregarded inasmuch as the reduction in the number of directors had taken effect before the election, while, on the other hand, the appellant contends that the filing of a transcript of the proceedings in the proper offices was essential to make the proposed reduction operative, and inasmuch as such transcript had not been filed, it was incumbent upon the corporation to choose six directors, and he must be deemed to have been duly elected.

The requirement of section 21 of the Stock Corporation Law in regard to the filing of the transcript is as follows: "The proceedings of such meeting shall be entered in the minutes of the corporation and a transcript thereof, verified by the president and secretary of the meeting shall be filed in the offices where the original certificates of incorporation were filed." The offices where the original certificates of incorporation were filed were the office of the county clerk of Westchester county and the office of the superintendent of banks at Albany. The transcript does not appear to have been filed in either place until January 27, 1906, ten days after the meeting at which the resolution was adopted. The papers read at Special Term in behalf of the respondent state that

one of these transcripts was filed in the office of the secretary of state, which would not have been the proper office; but the learned counsel for the respondent in his supplementary brief asserts that this statement was a clerical error, and that a transcript was filed as required by law in the office of the superintendent of banks. I shall assume such to be the fact, since in the view which I take of the law it can make no difference in the disposition of this appeal.

It is clear that a resolution to reduce the number of directors of a stock corporation under section 21 of the Stock Corporation Law does not take effect unless a transcript of the proceedings of the meeting at which the resolution was adopted shall subsequently be filed in the proper offices. If the transcript is never filed the resolution never becomes operative. It is also settled that such a resolution does not go into effect *until* the filing of the transcripts. In *Matter of Dolgeville Electric Light & Power Co.* (160 N. Y. 500) it was held to be essential to the legal reduction of the number of directors of a stock corporation that a transcript of the minutes of the stockholders' meeting at which the reduction was resolved upon should be filed in the offices where the original certificates of incorporation were filed. The proceeding there under consideration was an application for the voluntary dissolution of a stock corporation. Before the application a resolution that the number of directors be reduced from thirteen to five had been duly adopted at a special meeting of the stockholders, but a transcript of the minutes of that meeting had not been filed in the proper offices at the time when the proceedings for voluntary dissolution were instituted. The petition was verified, not by a majority of thirteen directors, but only by a majority of five, and this court held that it was insufficient to give the Supreme Court jurisdiction to entertain the application inasmuch as the filing of a transcript of the minutes of the stockholders' meeting at which the change was determined upon must have been filed in order to bring about the reduction under the statute.

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

In the Appellate Division the *Matter of Dolgeville Electric Light & Power Co.* (*supra*) was distinguished from the case at bar on the assumption that the transcript in the former case was never filed, and it was held that the filing of the transcript in this matter related back to the meeting of the stockholders and thus made the resolution of reduction effective at the time of the election. The learned court was mistaken, however, in assuming that the transcript was never filed in *Matter of Dolgeville Electric Light & Power Co.* It appears from the opinion of PARKER, Ch. J., in that matter (160 N. Y. 503), and also from the record on appeal that the transcript was in fact filed in the proper offices after the proceeding for the voluntary dissolution of the corporation had been instituted. If the doctrine of relation were applicable here it is difficult to perceive why it was not equally applicable in that case, and yet the court there refused to hold that the subsequent filing gave validity to the dissolution proceedings.

A careful consideration of the provisions of section 21 of the Stock Corporation Law convinces me that the number of directors cannot be deemed to be reduced until the date of filing the transcripts. Any other construction of the statute would inevitably lead to doubt and confusion. If the simple adoption of the resolution is pronounced sufficient to reduce the number of directors, then the statutory requirement as to the filing of the transcripts becomes nugatory; and if it be held that a subsequent filing relates back so as to give effect to a resolution not operative of itself, months might elapse as was the case in *Matter of Dolgeville Electric Light & Power Co.*, during which the stockholders would be uncertain as to whether a reduction had actually been brought about or not. My conclusion is that there was no reduction in the number of directors of the Westchester Trust Company until the transcript of the stockholders' meeting, at which such resolution was adopted, was actually filed in the office of the county clerk of Westchester county and in the office of the superintendent of banks. It follows that there were six directors to be chosen at the meeting of January 17th, 1906, and as only six persons

were then voted for, and the appellant was one of those persons, he is entitled to have his election as a director established.

The order of the Appellate Division should be reversed and the application of the appellant granted.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ., concur.

Order reversed, etc.

In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of FRANCIS B. COOLEY, Deceased.

CHARLES P. COOLEY et al., as Executors of FRANCIS B. COOLEY, Deceased, et al., Appellants; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

TRANSFER TAX — STOCK OF BOSTON AND ALBANY RAILROAD COMPANY OWNED BY NON-RESIDENT TESTATOR NOT ASSESSABLE AT ITS FULL VALUE. For the purpose of imposing a transfer tax upon stock of a non-resident testator in the Boston and Albany Railroad Company (a consolidated corporation separately created and organized under the laws of the state of New York and the state of Massachusetts, whose principal offices and the greater part of its lines are situated in the latter state), the valuation of the stock should be based upon an apportionment of the property between the New York and Massachusetts corporation; the stock should be appraised, not at its full value, but at a value representing the property of the corporation within this state, and a proper proportion of that situate outside of either state and moving (as in the case of rolling stock) back and forth between both states; such a method avoids double taxation, is equitable and just, and there is nothing in the statute or decisions thereunder requiring a tax measured by the full value of the stock in each state upon the theory that the corporation in that state owns all the property of the consolidated company.

Matter of Cooley, 113 App. Div. 388, reversed.

(Argued June 6, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 11, 1906, which affirmed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Francis B. Cooley, deceased.

The facts, so far as material, are stated in the opinion.

Charles P. Howland for appellants. Under section 220, subdivision 2, of the Tax Law, so much of the interest of the decedent in the Boston and Albany railroad as derives its value from franchises and properties owned and operated in another state by virtue of the charter granted by another sovereignty is not "property within the state" and is not within the scope of the act. (*Matter of Bronson*, 150 N. Y. 1; *Matter of James*, 144 N. Y. 6; *Matter of Whiting*, 150 N. Y. 27; *Matter of Houdayer*, 150 N. Y. 37; *Matter of Clinch*, 180 N. Y. 300; *Matter of Daly*, 100 App. Div. 373; 182 N. Y. 524; *Matter of Plummer*, 30 Misc. Rep. 19; 161 N. Y. 631; *Plummer v. Coler*, 178 U. S. 115; *Bristol v. Washington County*, 177 U. S. 133; *Matter of Palmer*, 183 N. Y. 238; *Richardson v. V. & M. R. Co.*, 44 Vt. 613; *State v. N., etc., R. Co.*, 18 Md. 193.) The act, if construed to include that part of the value of the decedent's interest in the Boston and Albany Railroad Company represented by the Massachusetts franchise and properties, imposes a tax upon the transmission of personal property located out of the state and is taxation without jurisdiction. It, therefore, deprives the taxpayer of his property without due process of law, and also denies to him the equal protection of the laws. (*St. Louis v. Ferry Co.*, 11 Wall. 423; *D., L. & W. R. R. Co. v. Pennsylvania*, 198 U. S. 341; *U. T. Co. v. Kentucky*, 199 U. S. 194; *Pullman Case*, 141 U. S. 18; *W. F. Co. v. East St. Louis*, 107 U. S. 365; *Plummer v. Coler*, 178 U. S. 115; *People v. E. T. Co.*, 96 N. Y. 387; *L., etc., Bank v. Block*, 117 Fed. Rep. 900.)

Charles M. Russell for respondent. The Boston and Albany Railroad Company is a domestic corporation of the state. (Wells on R. R. Corp. 16-24, 204; *People ex rel. Sage v. L. S. & M. S. R. R. Co.*, 70 N. Y. 220; *Boardman v. L. S. & M. S. R. R. Co.*, 84 N. Y. 181; *People v. N. Y., C. & St. L. R. R. Co.*, 61 Hun, 66; 129 N. Y. 474; *Janes v. F. R. R. Co.*, 50 Hun, 310; *Matter of B. & A. R. R. Co.*, 53 N. Y. 574; *St. L. & S. F. R. R. Co. v. James*, 161 U. S.

562; *People v. Rice*, 57 Hun, 487.) The stock of the Boston and Albany Railroad Company owned by decedent at the time of his death is "property within the state" under the provisions of subdivision 2 of section 220 of the Transfer Tax Law, and as such was properly assessed herein. (*Matter of Palmer*, 183 N. Y. 238; *Matter of Bronson*, 150 N. Y. 1; *Matter of Whiting*, 150 N. Y. 27; *Matter of Romaine*, 127 N. Y. 80; Cook on Corp. [5th ed.] 1205; 1 Thomp. on Corp. § 395; *Jermain v. L. S. & M. S. R. R. Co.*, 91 N. Y. 492.) The fact that a shareholder claims for the corporation incorporation in another state also, does not sufficiently alter the facts as to disturb in the slightest degree the well-settled rule of law above stated. The corporation remains a corporation incorporated under the laws of this state, and as such the property therein, represented by shares of stock, is taxable in transfer or succession. The location of the transfer office is not material. (Wells on R. R. Corp. 204; Baldwin's Am. R. R. Law, 17; *People ex rel. Sage v. L. S. & M. S. Ry. Co.*, 70 N. Y. 220; *Janes v. F. R. R. Co.*, 50 Hun, 310; *Boardman v. L. S. & M. S. R. R. Co.*, 84 N. Y. 181; *People v. N. Y., C. & St. L. R. R. Co.*, 129 N. Y. 474; *Bishop v. Brainard*, 28 Conn. 298; *Moody v. Shaw*, 173 Mass. 375; *Matter of Bronson*, 150 N. Y. 1; *St. L. & St. F. R. R. Co. v. James*, 161 U. S. 562; *Graham v. B. H. E. R. R. Co.*, 118 U. S. 169; *Clark v. Barnard*, 108 U. S. 436; *Stone v. F. L. & T. Co.*, 116 U. S. 307; *C. P. R. R. v. California*, 162 U. S. 91.) The scheme of stock valuation proposed by appellants is absolutely prohibited by statute. If followed it could be set aside as creating an unwarranted discrimination between domestic corporations. It would also unfairly discriminate in favor of a non-resident and against a citizen of this state. (L. 1891, ch. 34; *Matter of Ottendorfer*, N. Y. L. J. Jan. 14, 1903; *Matter of Gould*, 19 App. Div. 352; *Matter of Gould*, 156 N. Y. 423.)

Hiscock, J. The appellants complain because in fixing the transfer tax upon certain shares of the capital stock of the

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

Boston and Albany Railroad Company which belonged to the estate and passed under the will of the deceased who was a non-resident, said stock has been appraised at its full market value as representing an interest in the property of said corporation situate both in the state of New York and elsewhere. It is insisted by them that under the peculiar facts of this case the valuation placed for such purpose upon the stock should not have been predicated upon the idea that the latter represented an interest in all of the property of said corporation, but should have been fixed upon the theory that it represented an interest in only a portion of said property.

I think that their complaint is well founded and that the order appealed from should be reversed and the assessment corrected accordingly.

The Boston and Albany Railroad Company is a consolidation formed by the merger of one or more New York corporations and one Massachusetts corporation. The merger was authorized and the said consolidated corporation duly and separately created and organized under the laws of each state. It was, so to speak, incorporated in duplicate. There is but a single issue of capital stock representing all of the property of the consolidated and dual organization. Of the track mileage about five-sixths is in Massachusetts and one-sixth in New York. The principal offices, including the stock transfer office, are situated in Boston and there also are regularly held the meetings of its stockholders and directors. The deceased was a resident of the state of Connecticut and owned four hundred and twenty-six shares of the capital stock, the value of which for the purposes of the transfer tax was fixed at the full market value of \$252.50 per share of the par value of \$100.

The provisions of the statute (L. 1896, ch. 908, § 220, as amd. L. 1897, ch. 284, § 2), authorizing the imposition of this tax are familiar and read in part as follows :

“A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein * * * in the following cases : * * *

"2. When the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state at the time of his death."

The present assessment is under the last clause, and as already intimated the sole question, stated in practical form, is whether the authorities of this state ought to levy a tax upon the full value of decedent's holdings, recognizing simply the New York corporation and regarding it as the sole owner of all of the property of the doubly incorporated New York-Massachusetts corporation, or whether they should limit the tax to a portion of the total value, upon the theory that the company holds its property in Massachusetts at least under its incorporation in that state.

By seeking the aid of our laws and becoming incorporated under them the consolidated Boston and Albany Railroad Company became a domestic corporation. (*Matter of Sage*, 70 N. Y. 220.)

The decedent, therefore, as the owner of Boston and Albany stock, may be regarded as holding stock in a domestic corporation, and it is so clearly settled that we need only state the proposition that capital stock in a domestic corporation, although held by a non-resident, will be regarded as having its situs where the corporation is organized, and is, therefore, taxable in this state. (*Matter of Bronson*, 150 N. Y. 1.)

There is, therefore, no question but that the decedent, holding stock in the Boston and Albany road, which was incorporated under the laws of this state, left "property within the state" which is taxable here. There is no doubt about the meaning of "property within the state," as applied to this situation, or that it justifies a taxation by our authorities of decedent's interest as a shareholder in the corporation created under the laws of this state. The only doubt is as to the extent and value of that interest for the purposes of this proceeding. For, although the tax is upon the transfer and not upon the property itself, still its amount is necessarily measured by the value of the property transferred, and, therefore, we come to consider briefly the nature of the stock here

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

assessed as property and the theory upon which its value should be computed.

The general nature of a shareholder's interest in the capital stock of a corporation is easily understood and defined. In *Plimpton v. Bigelow* (93 N. Y. 592) it is said that "The right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts."

In *Jermain v. L. S. & M. S. Ry. Co.* (91 N. Y. 483, 491) it was said: "A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation."

Therefore, since the shares of capital stock under discussion represented a certain interest in the surplus of assets over liabilities of the Boston and Albany Railroad Company, the value of that stock is to be decided by reference to the amount of property which said railroad company as incorporated in this state is to be regarded as owning for the purposes of this proceeding.

In the majority of cases at least a corporation has but a single corporate creation and existence under the laws of one state, and by virtue of such single existence owns all of its corporate property. There is no difficulty in determining in such a case that a shareholder under such an incorporation has an interest in all of the corporate property wherever and in how many different states situated. I shall have occasion to refer to that principle hereafter in another connection. Even in the case of a corporation incorporated and having a separate existence under the laws of more than one state, the stockholder would for some purposes be regarded as having an interest in all of the corporate property independent of the different incorporations. In the present case the decedent, by virtue of his stock as between him and the corporation, would be regarded as having an interest in all of its property and entitled to the earnings thereon when distributed as dividends

and to his share of the surplus upon dissolution and liquidation proceedings independent of the fact that there were two separate incorporations.

But, as it seems to me, different considerations and principles apply to this proceeding now before us for review. Our jurisdiction to assess decedent's stock is based solely and exclusively upon the theory that it is held in the Boston and Albany Railroad Company as a New York corporation. The authorities are asserting jurisdiction of and assessing his stock only because it is held in the New York corporation of the Boston and Albany Railroad Company. But we know that said company is also incorporated as a Massachusetts corporation and presumably by virtue of such latter incorporation it has the same powers of owning and managing corporate property which it possesses as a New York corporation. In fact the location of physical property and the exercise of various corporate functions give greater importance to the Massachusetts than to the New York corporation, and the problem is whether for the purpose of levying a tax upon decedent's stock upon the theory that it is held in and under the New York corporation we ought to say that such latter corporation owns and holds all of the property of the consolidated corporation wherever situated, thus entirely ignoring the existence of and the ownership of property by the Massachusetts corporation. It needs no particular illumination to demonstrate that if we take such a view it will clearly pave the way to a corresponding view by the authorities and courts of Massachusetts that the corporation in that state owns all of the corporate property wherever situated, and we shall then further and directly be led to the unreasonable and illogical result that one set of property is at the same time solely and exclusively owned by two different corporations and that a person holding stock should be assessed upon the full value of his stock in each jurisdiction. Whether we regard such a tax as is here being imposed, a recompense to the state for protection afforded during the life of the decedent or as a condition imposed for creating and allowing certain rights of

N. Y. Rep.]

Opinion of the Court, per Hiscock, J.

transfer or of succession to property upon death, we shall have each state exacting full compensation upon one succession and a clear case of double taxation. And if the corporation had been compelled for sufficient reasons to take out incorporation in six or twenty other states each one of them might take the same view and insist upon the same exaction until the value of the property was in whole or large proportion exhausted in paying for the privilege of succession to it. While undoubtedly the legislative authority is potent enough to prescribe and enforce double taxation, it is plain that, measured by ordinary principles of justice, the result suggested would be inequitable and might be seriously burdensome.

Double taxation is one which the court should avoid whenever it is possible within reason to do so. (*Matter of James*, 144 N. Y. 6, 11.)

It is never to be presumed. Sometimes tax laws have that effect, but if they do it is because the Legislature has unmistakably so enacted. All presumptions are against such an imposition. (*Tennessee v. Whitworth*, 117 U. S. 129.)

The law of taxation is to be construed strictly against the state in favor of the taxpayer as represented by the executor of the estate. (*Matter of Fayerweather*, 143 N. Y. 114.)

It seems pretty clear that within the principles of the foregoing and many other cases which might be cited we ought not to sanction a course which will lead to a tax, measured by the full value of the decedent's stock, in each state upon the conflicting theories that the corporation in that state owns all the property of the consolidated company, unless there is something in the statute or decisions under the statute which compels us so to do. I do not think there is in either place such compelling authority.

No doubt is involved, as it seems to me, about the meaning and application of the statute. The decedent's stock was "property within the state," which had its situs here as being held in the New York corporation, and the transfer of it was taxable here. There can be no dispute about that. The

question is simply over the extent and value of his interest as such stockholder, in view of the other incorporation in Massachusetts. I see nothing in the statute which prevents us from paying decent regard to the principles of interstate comity and from adopting a policy which will enable each state fairly to enforce its own laws without oppression to the subject. This result will be attained by regarding the New York corporation as owning the property situate in New York and the Massachusetts corporation as owning that situate in Massachusetts, and each as owning a share of any property situate outside of either state or moving to and fro between the two states, and assessing decedent's stock upon that theory. That is the obvious basis for a valuation if we are to leave any room for the Massachusetts corporation and for a taxation by that state similar in principle to our own without double taxation.

Some illustrations may be referred to which by analogy sustain the general principles involved.

Where a tax is levied in this state upon the capital or franchises of a corporation organized as this railroad was, the tax is levied upon an equitable basis. Thus by the provisions of section 6 of chapter 19 of the Laws of 1869, under which the Boston and Albany railroad was organized, the assessment and taxation of its capital stock in this state is to be in the proportion "that the number of miles of its railroad situated in this state bears to the number of miles of its railroad situated in the other state," and under section 182 of the General Tax Law of the state of New York the franchise tax of a corporation is based upon the amount of capital within the state.

Again, assume that for purposes of dissolution or otherwise receivers were to be appointed of the Boston and Albany railroad, there can be no doubt that the receivers of it as a New York corporation would be appointed by the courts of that state, and the receivers of it as a Massachusetts corporation would be appointed by the courts of that state, and that the courts would hold that in the discharge of their duties the

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

New York receivers should take possession of and administer upon the property of the New York corporation within the limits of that state and would not permit the Massachusetts receivers to come within its confines and interfere with such ownership, and the Massachusetts courts would follow a similar policy. Why should not the state authorities for purposes of this species of taxation and valuation, involved therein, adopt a similar theory of division of property?

We are not apprehensive lest, as suggested, New York corporations may take out incorporation in other states for the purpose of exempting transfers of their capital stock from taxation under the principles of this decision. We do not regard our decision as giving encouragement to any such course. It is based upon and limited by the facts as they are here presented, and there is no question whatever but that the Boston and Albany railroad, in good faith and for legitimate reasons, was equally and contemporaneously created both as a New York and a Massachusetts corporation. It can no more be said that being originally and properly a New York corporation it subsequently and incidentally became a Massachusetts one than could be maintained the reverse of such proposition. If in the future a corporation created and organized under the laws of this state, or properly and really to be regarded as a New York corporation, shall see fit either for the purpose suggested, or for any other reason subsequently and incidentally and for ancillary reasons, to take out incorporation in another state, a case would arise not falling within this decision.

But it is said that this court has already made decisions which prevent it from adopting such a construction as I have outlined, and reference is made to *Matter of Bronson* (150 N. Y. 1) and *Matter of Palmer* (183 N. Y. 238).

I do not find anything in those decisions which, interpreted as a whole, with reference to the facts there being discussed, conflicts with the views which I have advanced.

In the first case the question arose whether a tax might be imposed upon a transfer of a non-resident decedent's residuary estate which "consisted in shares of the capital stock and in

the bonds of corporations incorporated under the laws of this state." So far as the discussion relates to the question of taxing the bonds it is immaterial. It was held that the shares of capital stock were property which was taxable, it being said : "The shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. The corporation has the legal title to all the properties acquired and appurtenant, but it holds them for the pecuniary benefit of those persons who hold the capital stock. * * * Each share represents a distinct interest in the whole of the corporate property." In other words, Judge GRAY, in writing the majority opinion, was discussing the situation of a shareholder in a domestic corporation which, so far as appears, was not incorporated under the laws of another state. Under such circumstances, of course, the New York corporation would be the owner of all the property there was, and the shareholder's interest in such corporation would represent his interest in all of said property and be fairly and justly taxable upon its full amount and value. No such situation was presented as here arises. There was no second or third corporation under the laws of another state, which corporation might just as fairly be said to be the owner of all of the property as the New York corporation, thus raising the question here presented whether each corporation should be regarded as owning and holding all of the property there was for the purpose of laying the basis for taxation, or whether we should adopt an equitable and reasonable view, giving credit to each corporation for the purpose of taxation of owning some certain portion of the entire property.

In the *Palmer* case again the question arose over taxing shares of stock held by a non-resident decedent in a domestic corporation which was not proved or considered to have been incorporated under the laws of another state. It was insisted that the amount of the tax should be reduced by the proportion of property owned by the corporation and located in other states, and this contention was overruled, and, as it seems

to me, for a perfectly good reason upon the facts in that case and which is not applicable to the facts here. As stated, there was a single incorporation under the laws of this state, and that domestic corporation owned all of the property in whatever state situated. Its corporate origin was under the laws of this state, and there its corporate existence was centered. It just as fully and completely owned and managed property situated in the state of Ohio as if it was situated in the state of New York, and if the property in the foreign state was reduced to money such money would be turned into its treasury in the state of New York. Under such circumstances there was nothing else that could reasonably be held than that the corporation owned all property wherever situated, and that the shareholder's interest in such corporation represented and was based upon such ownership of all the property. There was no double incorporation and no chance for conflict between an incorporation under the laws of this state and a second one existing under the laws of another state which must either be reconciled by a just regard for the rights of both states and the rights of the incorporation under each, or else double taxation imposed upon a shareholder.

It is also argued that the courts of Massachusetts have passed upon the very contention here being made by appellants, and in the case of *Moody v. Shaw* (173 Mass. 375) have rejected the claim that the valuation of stock in this same corporation for the purposes of transfer taxation in Massachusetts should be based upon any apportionment of property between the Massachusetts and New York corporations. The opinion in that case does not seem to warrant any such construction. Apparently the only question under discussion was whether the transfer of stock in said corporation was taxable at all in Massachusetts, and the question of any apportionment was not passed upon. Such expressions as are found in the opinion touching that point certainly do not indicate to my mind that if involved and passed upon it would have been decided adversely to the views here expressed.

Lastly, it is urged that there will be great practical difficulty

in making an apportionment of property for the purposes of valuation and taxation upon the lines suggested, and the learned counsel for the respondent has suggested many difficulties and absurdities claimed to be incidental to such course of procedure. Most of them certainly will not arise in this case and they probably never will in any other. Of course an appraisal based upon an apportionment of the entire property of the consolidated company between the New York and Massachusetts corporations may be made a source of much labor and expense if the parties so desire. Possibly it might be carried to the extent of a detailed inventory and valuation of innumerable pieces of property. Upon the other hand, an apportionment based upon trackage or figures drawn from the books or balance sheets of the company may doubtless be easily reached which will be substantially correct and any inaccuracies of which when reflected in a tax of one per cent upon 426 shares of stock will be inconsequential.

The order of the Appellate Division and of the Surrogate's Court of the county of New York should be reversed, with costs, and the proceedings remitted to said Surrogate's Court for a reappraisal of the stock in question in accordance with the views herein expressed.

CULLEN, Ch. J., GRAY, O'BRIEN, and EDWARD T. BARTLETT, JJ., concur; WERNER and CHASE, JJ., dissent.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY C. KEIM et al., Appellants, v. JOHN C. DESMOND et al., Composing the BOARD OF ASSESSORS OF THE CITY OF UTICA, et al., Respondents.

1. UTICA (CITY OF) — ASSESSMENT FOR SEWER — WHEN ERRONEOUS UNDER STATUTES CREATING BOARD OF ASSESSORS IN AND FOR CITY OF UTICA. Where a sewer which provides adequate drainage for the premises situated upon the west side of a street in the city of Utica was built many years ago and the entire cost thereof was assessed solely upon the property upon that side of the street because it conferred no

N. Y. Rep.]

Statement of case.

benefit upon the premises on the east side of the street, which is considerably lower and cannot drain into such sewer, it is erroneous in making the assessment for a sewer subsequently built upon and for the benefit of the east side of the street to assess the property owners on the west side of the street at the same rate per foot as those on the east side, where the statute (L. 1897, ch. 738, as amd. by L. 1898, ch. 215 and L. 1901, ch. 884, § 11, sub. 2) creating a board of assessors in and for the city of Utica and defining its powers, directs the board to assess the expense of sewer construction "upon the lands benefited by the local improvement in proportion to such benefit;" since the assessment ignores the radical difference in the benefit conferred upon the west side property, which was already supplied with an adequate sewer paid for solely out of an assessment on the west side, and the benefit conferred upon the east side property which was wholly without any sewer until the present improvement.

2. SAME — CERTIORARI TO REVIEW ASSESSMENT — WHEN FACTS ALLEGED IN PETITION THEREFOR MUST BE DEEMED TO BE ADMITTED BY RETURN. Where the petition of owners of property, upon the west side of such street, for a writ of certiorari to review such assessment, alleges the facts above stated and the return of the assessors thereto alleges that the new sewer "as laid is a benefit to the property owners equally upon both sides of the street," but is silent as to material allegations of facts contained in the petition, the presumption is that the officers making the return intended to admit these allegations. It must, therefore, be deemed admitted that the first sewer at the time when the second sewer was constructed furnished adequate drainage to the property of the relators and that they did not need any additional sewer facilities for the drainage of their premises.

People rel. Keim v. Desmond, 111 App. Div. 757, reversed.

(Argued October 3, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 10, 1906, which affirmed a determination of the board of assessors of the city of Utica in assessing the relators for a local improvement and dismissed a writ of certiorari to review the same.

The facts, so far as material, are stated in the opinion.

W. L. Goodier for appellants. The assessors violated the rule of law prescribed by the Utica charter, that assessments for the cost of sewers shall be made upon the property benefited in proportion to the benefit. The re-assessment set out

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.]

in the return shows on its face that it is made upon the frontage principle and not on the benefit principle. (L. 1897, ch. 738; L. 1898, ch. 215; L. 1901, ch. 384, § 11, sub. 2; *People ex rel. Brockport v. Sutphin*, 166 N. Y. 163; *People ex rel. Kinsella v. Wurster*, 89 Hun, 6; *People ex rel. Smith v. Wurster*, 89 Hun, 7; *County of Monroe v. City of Rochester*, 154 N. Y. 578; *Elwood v. City of Rochester*, 122 N. Y. 228.) The assessors having violated the rule of law prescribed by the charter, to the prejudice of relators, their assessments should be set aside. (*Clark v. Vil. of Dunkirk*, 12 Hun, 181; *People ex rel. Parker v. Co. Court*, 55 N. Y. 604; *People ex rel. Conolly v. Reis*, 109 App. Div. 748; *County of Monroe v. City of Rochester*, 88 Hun, 164; *County of Monroe v. City of Rochester*, 154 N. Y. 571; *Harriman v. Yonkers*, 181 N. Y. 24.)

William Townsend for respondents. The board of assessors in making this assessment did not violate any rule of law affecting the rights of the parties thereto to the prejudice of the relator. (L. 1897, ch. 738; L. 1898, ch. 215; L. 1901, ch. 384.) It was the proper method of assessment to average the expense per front foot. (*Mechener v. Philadelphia*, 118 Penn. St. 535; 2 Cooley on Taxn. 1172.) It is only where the invalidity of the assessment appears upon the face of the proceedings that it can be set aside upon a common-law certiorari. (*Clark v. Vil. of Dunkirk*, 12 Hun, 187.) The fact that the assessment was made at a uniform rate according to frontage is not fatal to the assessment for it may correctly represent the proportionate benefit of the improvement to each lot. (*People ex rel. Scott v. Pitt*, 169 N. Y. 521; *City of Ithaca v. Babcock*, 72 App. Div. 260; *Donovan v. City of Oswego*, 90 App. Div. 377; *O'Reilly v. City of Kingston*, 114 N. Y. 439; *Matter of Cruger*, 84 N. Y. 619; *Matter of Eager*, 46 N. Y. 100.)

WILLARD BARTLETT, J. The relators sued out a writ of certiorari to review a final determination of the board of

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

assessors of the city of Utica in laying an assessment upon their lands for the construction of a sewer in South Hamilton street in that city. The property of the relators is on the west side of the street and is already drained by a twelve-inch sewer constructed many years ago under a resolution of the common council adopted in 1871. The assessment for that sewer was imposed solely upon premises on the west side of South Hamilton street inasmuch as the sewer conferred no benefit upon the property on the east side, which was considerably lower and could not drain into it. The new sewer, to which the present proceeding relates, is of the same dimensions as the old one but is laid under the easterly part of the street so as most conveniently to drain the lands on the east. Notwithstanding the contention of the relators that they were already provided with adequate drainage facilities by reason of the existence of the old sewer, the board of assessors assessed the property owners on the west side of the street at the same rate per foot as those on the east side; and in this proceeding the action of the board is challenged as illegal in that it disregards the mandate of the statute that the board of assessors shall assess the expense of such sewer construction "upon the lands benefited by the local improvement in proportion to such benefit." (Laws of 1897, chap. 738, as amended by Laws of 1898, chap. 215, and Laws of 1901, chap. 384, section 11, sub. 2.)

It is alleged in the petition, and is not denied, that the entire cost of the first sewer was assessed upon and paid by the relators and their grantors, the owners of the lands on the westerly side of South Hamilton street; that said sewer ever since its construction has furnished and now does furnish adequate drainage to the lands and houses of the relators; that no other or additional sewers have since been needed or are now needed by them for the drainage of their lands; and that their property prior to the construction of the new sewer already had sufficient drainage by the pre-existing sewer on their own side of the street. In the return there is a general allegation that the new sewer "as laid is a benefit to the

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.]

property owners equally upon both sides of the street;" but this statement — which is merely the statement of a conclusion — in no wise controverts the specific averments of the petition to which reference has been made. We, therefore, have a case for the application of the presumption that when the return to a writ of certiorari is silent as to material allegations of facts contained in the petition the presumption is that the officers making the return intended to admit these allegations. (*People ex rel. Village of Brockport v. Sutphin*, 166 N. Y. 163.) It must, therefore, be deemed admitted by the respondents that the first sewer at the time when the second sewer was constructed furnished adequate drainage to the property of the relators and that they did not need any additional sewer facilities for the drainage of their premises.

If such are the facts it is difficult to perceive any justification for the act of the board of assessors in fixing the assessment at the same rate per front foot upon the property on both sides of South Hamilton street. Of course it does not follow merely because an assessment is made at a uniform rate according to frontage that the assessors had violated any rule of law to the prejudice of the property owners. An assessment on that principle for the construction of a sewer may often in fact correctly represent the proportionate benefit of the improvement to each lot. (*People ex rel. Scott v. Pitt*, 169 N. Y. 521.) In making this assessment, however, the assessors appear to have acted upon an erroneous principle in ignoring the radical difference in the benefit conferred upon the west side property, which was already supplied with an adequate sewer paid for solely out of an assessment on the west side, and the benefit conferred upon the east side property, which was wholly without any sewer until the present improvement. The adoption of the foot frontage rule under these circumstances, as applicable to the property on both sides of the street, is manifestly inconsistent with the command of the statute that the amount to be raised for a local improvement of this character in Utica is to be assessed upon the lands benefited in proportion to such benefit. The spe-

N. Y. Rep.]

Statement of case.

cific facts alleged in the petition and not denied in the return of the board of assessors show that the benefit to the west side property was insignificant as compared with the benefit to the lands on the east side of South Hamilton street; so that the application of the same rule to the premises on both sides involved the adoption of a principle in respect to the assessment as a whole which failed to fulfill the requirement of proportionate equality contemplated by the law. Hence the action of the assessors is subject to review here even under the doctrine of the case chiefly relied upon by the respondents. (*O'Reilly v. City of Kingston*, 114 N. Y. 439, 448.) The circumstances and situation of the lands on the different sides of a city street may be such, and in the present case clearly are such, as to make the adoption of the foot frontage rule in this particular instance inconsistent with the observance of the proportionate benefit principle which it was the statutory duty of the assessors to observe.

These views lead to a reversal of the order of the Appellate Division and the annulment of the determination of the board of assessors of the city of Utica, with costs to appellants in both courts.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ., concur.

Ordered accordingly.

In the Matter of the Application of the MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent, Relative to Acquiring Title to Lands for the Purpose of Opening Van Cortlandt Avenue.

JULIA E. CAMERON, Appellant.

1. NEW YORK (CITY OF)—TAKING OF LANDS OWNED BY CITY, FOR WATER PIPE LINES, FOR STREET PURPOSES. Where the board of street opening and improvement of the city of New York, acting under the authority of section 970 of the charter, adopted a resolution requesting the counsel to the corporation to acquire title "wherever the same has not been heretofore acquired for the use of the public to the lands, tene-

ments and hereditaments that shall or may be required for the purpose of opening and extending Van Cortlandt Avenue" between points therein named, and directed "That the entire costs and expense of such proceedings shall be assessed upon the property deemed to be benefited thereby," the commissioners of estimate and apportionment, duly appointed to ascertain and determine the compensation to be made to the respective owners of the land to be taken, and to assess the cost of the improvement upon the persons and property deemed to be benefited thereby, as provided by section 980 of the charter, are justified in including in their award of damages an amount allowed to the city of New York for the loss and damage sustained by it by the opening and extension of said avenue over certain parcels of land previously acquired and purchased by the city in fee simple absolute for the purpose of laying and maintaining thereunder water pipe lines for the city water supply, said parcels of land having been paid for from the proceeds of bonds issued for that purpose and payable by general taxation.

2. SAME — WHEN CITY ENTITLED TO COMPENSATION FOR LANDS SO TAKEN. The lands belonging to the city for its water pipe lines and taken under the resolution opening and extending Van Cortlandt avenue, were never acquired for street purposes, but the language of that resolution has special reference to the opening and extension of that avenue, and should be construed not only with reference to that purpose but also with reference to section 995 of the charter providing that when any property belonging to the city of New York be required for the opening or extension of streets or shall be benefited thereby "the city shall be entitled to compensation and recompense for the loss and damage it may sustain, and shall be bound to allow and pay for the benefit and advantage it may be deemed to acquire thereby, in like manner as other owners and proprietors of lands and premises required for the purpose of making the said * * * improvement, or deemed to be benefited thereby;" and so construed it must be held that it was not the intention of the board of street opening and improvement, by their resolution, to except from the lands to be acquired that part thereof that had already been acquired by the city for the purposes of the water supply.

3. SAME — DEDICATION OF LANDS OWNED BY THE CITY, FOR OTHER PURPOSES, FOR STREET IMPROVEMENTS — PURPOSE AND EFFECT OF SECTION 995 OF THE CITY CHARTER. Where real property has been acquired by the city of New York for general corporate purposes and paid for by general tax, the taking thereof for street purposes, by which the owners of abutting lands are benefited to the extent of the cost of the improvement, would result in a benefit to the abutting owners at the expense of the general taxpayer unless compensation could be allowed to the city for its lands so taken, since the proceeding, so far as the city is concerned as the owner in fee of the lands in question, results in a dedication of such lands for street purposes, and section 995 of the city charter was enacted for the express purpose of adjusting the rights and equities between

N. Y. Rep.]

Points of counsel.

abutting owners and the general taxpayer so that the city should receive compensation for its loss and damage in such cases "in like manner as other owners and proprietors of lands and premises required for the purpose of making the said * * * improvement."

Matter of Mayor, etc., of New York, 114 App. Div. 904, affirmed.

(Argued October 2, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 20, 1906, which affirmed an order of Special Term confirming the report of commissioners of estimate and assessment in the above-entitled proceeding.

The facts, so far as material, are stated in the opinion.

John C. Shaw and *Joseph S. Frank* for appellant. By the terms of its resolution, the board of street opening and improvement directed that no award should be made for damage parcels 1, 1A, 1B, 10 and 10A, and that the assessment should be limited to the cost and expense of the acquisition of the damage parcels other than those just specified. The city is absolutely bound by this resolution, which is the fundamental basis of the proceeding. (*Matter of City of Buffalo*, 78 N. Y. 362.) The commissioners cannot question their own jurisdiction and are bound by the order appointing them. They should, therefore, have excluded the damage parcels owned by the city from their consideration, and should have made no assessment of the unauthorized awards for those parcels. (*Matter of Grand Boulevard*, 33 App. Div. 210.) There was no evidence of loss or damage to the city, and the halving of the fee value, which was the preliminary award, indicates that the commissioners did not base their final award upon any just estimate of loss and damage. (*Matter of Foster Ave.*, 89 App. Div. 490; *Park Comrs. v. Armstrong*, 45 N. Y. 234; *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268; *Whitney v. State*, 96 N. Y. 240; *Eldredge v. City of Binghamton*, 120 N. Y. 309.)

John J. Delany, Corporation Counsel (*Theodore Connolly*, *John P. Dunn* and *Thomas C. Blake* of counsel), for

respondent. The commissioners were obliged to make awards to the city for the lands in question. (*Matter of Grand Boulevard*, 33 App. Div. 212.) Neither the resolution of the board of street opening and improvement nor the title of the proceeding require that no compensation should be made for the city's interest in the property required for this improvement. (*Village of Olean v. Steyner*, 135 N. Y. 341.) Unless compensation is made for the partial interest which is required in this proceeding for the use made of the water supply property for highway purposes, property belonging to the taxpayers at large will be converted to the use of the few owners benefited without compensation. (L. 1901, ch. 466, §§ 970, 980, 1003.) Section 995 of the Greater New York charter expressly authorizes commissioners of estimate and assessment to make awards to the city of New York for its lands formerly condemned for the water supply line but now required for this improvement. (*Matter of Cooper*, 93 N. Y. 507; *Matter of Ninth Avenue*, 45 N. Y. 729; *Matter of City of Buffalo*, 68 N. Y. 172.)

CHASE, J. The only question involved in this appeal is stated in a stipulation signed by the parties as follows: "Is it proper for the commissioners to make awards to the city of New York for damage to parcels Nos. 1, 1A, 1B, 10 and 10A in this proceeding?"

By chapter 445 of the Laws of 1877 the commissioner of public works in the city of New York was authorized to acquire real estate as therein defined for maintaining, preserving and increasing the supply of pure and wholesome water for the use of said city. Pursuant to that act, the city acquired the title in fee to certain real property under which was laid what is known as the Bronx river water supply pipe line. The real property so taken by the city was paid for from the proceeds of bonds issued by the comptroller of the city and payable by general taxation pursuant to the terms of said act. On the 15th day of May, 1896, the board of street opening and improvement of said city adopted a resolution requesting

N. Y. Rep.] Opinion of the Court, per CHASE, J.

the counsel to the corporation to acquire title "wherever the same has not been heretofore acquired for the use of the public to the lands, tenements and hereditaments that shall or may be required for the purpose of opening and extending Van Cortlandt Avenue" between points therein named. And it was by it further resolved: "That the entire costs and expense of such proceedings shall be assessed upon the property deemed to be benefited thereby." A petition for the appointment of commissioners of estimate and assessment was thereupon made in which it is recited that the board of street opening and improvement deem it necessary, useful and proper for public interest and convenience to acquire all the lands and premises therein particularly described for the opening and extension of said avenue, and an order was entered by the court May 7th, 1897 (after the Greater New York charter became a law), appointing commissioners of estimate and assessment accordingly. Included in the lands which are stated to be required for the opening and extension of Van Cortlandt avenue, and in the specific descriptions contained in said petition and order, are the parcels Nos. 1, 1A, 1B, 10 and 10A mentioned in the stipulation and other lands owned by individuals. The commissioners of estimate and assessment included in their award for damages an amount to the city of New York for its loss and damage sustained by the opening and extension of said avenue over said parcels of land, and such award to the city of New York was included in the estimate for assessment upon the property deemed by them to be benefited by the opening and extension of said avenue. The court confirmed the report of said commissioners, and the appellant, being one of the persons assessed for a portion of the value of the benefit and advantage of the said improvement, appealed to the Appellate Division, where the order of the Special Term, confirming the report of the commissioners, was unanimously affirmed, and from such order of affirmance the appeal is taken to this court.

Real property is purchased and acquired by municipalities for different purposes; it is held in fee or otherwise depend-

ent in part upon the authority by which it is purchased or acquired. The consideration for real property so purchased or acquired for certain purposes is paid by taxes levied upon all the taxable property within the municipality, and for certain other purposes by special assessment levied upon the property of individuals and corporations specially and peculiarly benefited by the improvement which requires the acquisition of such real property. The lands of the city of New York in question were acquired in fee simple absolute, and the bonds given to raise the money to pay therefor, if still unpaid, are a general charge against the city. It is expressly provided by section 970 of the said charter that the city of New York is authorized to acquire title for the use of the public to all or any of the lands required for street and other purposes therein named, and that compensation and recompense shall be made "to the parties and persons, if any such there shall be, to whom the loss and damage thereby shall be deemed to exceed the benefit and advantage thereof for the excess of the damage over and above the value of said benefit," and that the commissioners of estimate and assessment appointed to ascertain and determine the compensation and recompense which shall be made to the respective owners of the lands to be taken shall also "assess the cost of such improvement, or such proportion thereof, as the Board of Estimate and Apportionment directs, upon such parties and persons, lands and tenements as may be deemed to be benefited thereby." It is further provided by section 980 of said charter that "the Board of Estimate and Apportionment may in any case determine whether any and, if any, what proportion of the cost and expense thereof shall be borne and paid by The City of New York, and the remainder of such cost and expense shall be assessed upon the property deemed to be benefited thereby."

The appellant contends that the language of the resolution of the board of street opening and improvement, requesting the counsel to the corporation to take the necessary proceedings to acquire title to the lands required for opening and

extending Van Cortlandt avenue, excepts the lands previously acquired by the city. The lands in question were never acquired specially for street purposes. The language of the resolution had special reference to the opening and extension of Van Cortlandt avenue and to property required for the purpose of such opening and extension. It was clearly so construed by the court in granting the order appointing the commissioners of estimate and assessment. No motion has ever been made to vacate or modify that order. (*Matter of Grand Boulevard*, 33 App. Div. 210.) The resolution should be construed not only with reference to the purpose for which it was desired that the property should be acquired, but also with reference to the provisions of section 995 of said charter, and as so construed we are of the opinion that it was not the intention of the board of street opening and improvement, by their resolution, to except from the lands to be acquired that part thereof that had already been acquired by the city for the purposes of the water supply.

Section 995 of the city charter provides:

"§ 995. If any lands, tenements, hereditaments or premises belonging to The City of New York, or wherein it may be interested, shall be required for any of the purposes aforesaid, or shall be benefited by any such operation and improvement as hereinbefore mentioned, the city shall be entitled to compensation and recompense for the loss and damage it may sustain, and shall be bound to allow and pay for the benefit and advantage it may be deemed to acquire thereby, in like manner as other owners and proprietors of lands and premises required for the purpose of making the said operation and improvement, or deemed to be benefited thereby; and it shall be lawful for the said commissioners of estimate and assessment, and they are hereby directed in such, each and every case, to estimate and assess upon the principals, and in the manner herein aforesaid; and to report the sum or sums which, in their opinion, ought to be allowed and paid to or by the city for the said loss and damage, or for the said benefit or advantage, as the case may be, to the city, by and in con-

sequence of said operation and improvements of opening the said street or park, or section thereof so to be opened, or laying out, or forming, or extending, enlarging or otherwise improving the same, so to be laid out and formed, or extended, enlarged or otherwise improved, as the case may be. It shall not, however, be lawful to lay or impose any assessment whatever on any public park, square, or place, or street, road or avenue, but all such assessments which may be properly payable by the city shall be assessed against it in a gross sum in each and every such proceeding."

Persons owning real property abutting upon other real property owned by a municipality do not have easements in or over the municipal property simply because the property is owned by a municipality and not by an individual. Real property acquired by a municipality for general corporate purposes, and not for street or other special purposes, is held pursuant to the deeds of conveyance the same as individuals hold real property. The abutting owners upon the lands in question prior to this proceeding did not have any right of access over the same, or right to protect the free circulation of light and air to their property. The maintenance of a public street secures to abutting owners certain rights and easements which constitute benefits to such abutting owners. When lands are acquired by a municipality and paid for by special assessment, there is an implied contract that the benefits derived by the payment of such assessment shall be protected. This court, in speaking of the rights of owners of land abutting upon a public street, say, in *Lahr v. Metropolitan E. R. Co.* (104 N. Y. 268):

"An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to, and through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property,

and are legitimate subjects of estimate by the public authorities, in raising the fund necessary to defray the cost of constructing the street. He is, therefore, compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property.

“ Although it may be assumed that the municipality by proceedings, to open a street, acquires the fee to the land taken, it is yet a qualified fee, held in trust under the statute for a certain use, and that use cannot be departed from without violating an essential condition of the contract under which the land was obtained.”

It is by reason of such benefits that it is provided in the charter of the city of New York and other city charters that the costs and expense of laying out a public street shall be assessed in whole or in part upon the lands so to be benefited. If real property can be acquired for general corporate purposes and paid for by general tax, and then devoted to street purposes where abutting lands will be benefited to an extent equal to the cost of acquiring such lands, it would result in a benefit to such abutting owners at the expense of the general taxpayer. Section 995 of said city charter was enacted for the express purpose of adjusting the rights and equities as between such abutting owners and the general taxpayer. It is suggested that as the pipe line is wholly beneath the surface of the ground that the city will not be injured by using the surface of the land for street purposes. It is not true, in fact, that the city is not damaged. Even if the pipe line as now constructed is not disturbed by the laying out and maintenance of a street, it does not appear that it may not be necessary to change the pipe line, or that the surface of the soil may not hereafter be required for the purposes mentioned in the act of 1877.

Where the absolute and unqualified title to land is owned by a municipality it may be used for any of the purposes of such municipality. (*Whitney v. State of N. Y.*, 96 N. Y.

240; *Eldridge v. City of Binghamton*, 120 id. 309.) So far as the city of New York is concerned, it could undoubtedly have devoted this land to street purposes. As the city owned the property in question in fee simple absolute it could have erected thereon a public building, maintained thereon a public park or street, or, if the property was not required for the purposes of the water supply, it could have been sold and the proceeds of the sale applied to the general purposes of the corporation and to the advantage of the general taxpayer. As we have seen, however, when such property is dedicated to the use of the public as a street it is inconsistent with the absolute fee. (*Matter of Ninth Ave. and Fifteenth St.*, 45 N. Y. 729.) The general taxpayer, by such dedication, has suffered a damage, and the abutting owners have acquired an advantage. This proceeding, so far as the city is concerned as an owner in fee of the lands in question, results in a dedication of such lands to street purposes, and the lands in question were included in this proceeding in obedience to section 995 of the city charter, not for the purpose of condemning for its own use lands already owned by the city, but as a means established by legislative authority in connection with acquiring the title to lands for street purposes to determine what compensation and recompense for the loss and damage to the city at large should be made to the city, and what persons or property specially benefited thereby should pay the same. The statute is necessary and proper for the purpose of doing justice to the general taxpayer as against the persons specially benefited by dedicating the property to street purposes, and, in the language of the statute, the appellant and others should pay for the loss and damage to the city "in like manner as other owners and proprietors of lands and premises required for the purpose of making the said operation and improvement."

No other question is presented by this appeal. The order should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WERNER, JJ., concur; WILLARD BARTLETT, J., dissents.

Order affirmed.

HADDAM GRANITE COMPANY, INCORPORATED, Respondent, v.
THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

SALES — CONSTRUCTION OF CONTRACT FOR ARTICLES TO BE DELIVERED AT SPECIFIED TIMES IN THE FUTURE — MEASURE OF DAMAGES FOR BREACH OF CONTRACT — EVIDENCE. Where it appears, in an action brought to recover damages alleged to have been suffered by plaintiff by reason of defendant's failure to take and pay for a certain number of granite paving blocks, that the order, made by defendant and accepted by plaintiff, which constituted the contract in question, merely stated that the defendant would take a specified number of granite blocks of specified sizes at a specified price per thousand to be delivered at a specified place, and there is nothing contained in the order or alleged in the complaint showing that the blocks were to be manufactured in the future or that they were required to be of any specified granite or to be taken from any particular quarry, so that the plaintiff might have fulfilled the contract by purchasing the blocks in the open market, or of any quarry owner, and delivering them to the defendant at the place specified, the measure of damages is the difference between the market value of the blocks and the contract price; it is error, therefore, after permitting the plaintiff to show that the blocks had no market value, to exclude evidence, offered by the defendant, to show that plaintiff's witnesses were mistaken and that there was a general market value for granite paving blocks.

Haddam Granite Co. v. Bklyn. Heights R. R. Co., 107 App. Div. 616, reversed.

(Argued October 12, 1906; decided October 23, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 13, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

John L. Wells, Thomas L. Hughes and George D. Yeomans for appellant. The court erred in excluding the evidence offered by the defendant that there was a standard market value for the paving blocks described in the alleged contract. (*Masterton v. Mayor, etc.*, 7 Hill, 61; *N. Y. & M. G. P. Co. v. Howell*, 7 N. Y. S. R. 494; *Cahan v. Platt*, 69 N. Y. 348; *Canda v. Wick*, 100 N. Y. 127; *Bigelow v. Legg*, 102 N. Y. 652; *Windmuller v. Pope*, 107 N. Y. 674; *Todd v. Gamble*, 148 N. Y. 382; *Kelso v. Marshall*, 24

App. Div. 128; *Snell v. R. P. Co.*, 102 App. Div. 139; *Kingman v. H. W. Co.*, 52 N. E. Rep. 328.)

John Ewen for respondent. Where the purchaser of goods to be manufactured repudiates the contract in advance of the manufacture of the goods, or is guilty of a breach of contract which justifies the vendor in suspending the further manufacture of the goods and he does so, then the measure of damages is the difference between the cost of manufacture and the contract price. (*Belle of Bourbon Co. v. Leffler*, 87 App. Div. 302; *Nichols v. S. S. Co.*, 137 N. Y. 471; *Roehm v. Horst*, 178 U. S. 1; *Hinckley v. P. B. S. Co.*, 121 U. S. 264; *P. W. & B. R. R. Co. v. Howard*, 13 How. [U. S.] 307; *U. S. v. Speed*, 75 U. S. 77; *U. S. v. Behan*, 110 U. S. 338; *Hall v. Trout*, 35 Cal. 229; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242; *Sullivan v. MacMillan*, 26 Fla. 543.)

HAIGHT, J. This action was brought to recover damages alleged to have been sustained by the plaintiff by reason of the failure to take and pay for four hundred thousand granite paving blocks, under an alleged contract between the plaintiff and defendant providing that defendant would take five hundred thousand granite blocks from the plaintiff and pay for the same the sum of sixty-two dollars per thousand.

Upon the trial it was conceded that one hundred thousand granite blocks had been taken by the defendant and paid for, so that the controversy arises with reference to the remaining four hundred thousand blocks. The question brought up for our determination has reference to the measure of damages adopted by the trial court. The contention on the part of the plaintiff is that the contract called for goods to be manufactured and delivered at specified times; that such goods had no general market value, and, therefore, the measure of damages was the difference between the cost of production and delivery and the price agreed upon. On behalf of the defendant the contention is that there was a standard market value for granite paving blocks of the dimensions called for, and that the measure of damages, if any, was the difference

between the market value and the contract price. The plaintiff, in support of its contention, called its treasurer as a witness and asked the question as to "Whether or not there is a general market for that sort of blocks," referring to the paving blocks called for by the specifications. To this the defendant's counsel interposed an objection as incompetent and immaterial, but the objection was overruled and the witness was permitted to answer, under the exception of the defendant's counsel, in effect that there was not. The plaintiff then, under the objection and exception of the defendant's counsel, proceeded to show the cost of production and delivery at the place required by the contract, for the purpose of establishing the measure of damages which it contended it was entitled to have adopted. The defendant called as a witness on its behalf the purchasing agent of the defendant company, who testified that he was familiar with the market generally of granite paving blocks of the character and size described in the specifications, and then he was asked if he had made inquiry and bid for blocks of this character in the open market during that time, alluding to the period referred to in the contract. The question was objected to by the plaintiff's counsel as immaterial and irrelevant. The court sustained the objection and the defendant took an exception. The defendant's counsel then asked the question as to whether there was a market value in Brooklyn for these granite blocks. There was the same objection, ruling and exception. In submitting the case to the jury the trial court charged that the measure of damages was the difference between the cost of production and the delivery at the defendant's dock and the price agreed upon, to which the defendant excepted. The question, therefore, as to the measure of damages which the plaintiff is entitled to recover is squarely presented for our determination.

It is apparent that the plaintiff's counsel considered the question as to whether there was a general market value for granite paving blocks one of fact to be determined from the evidence, inasmuch as he was careful to prove by the treasurer of the plaintiff that there was no such market value, and yet

when the defendant undertook to prove that there was such a market value its counsel was prohibited from so doing by an objection of the plaintiff's counsel and the ruling of the trial court in his favor. If it was competent and proper for the plaintiff to show that such blocks had no market value it would seem that the defendant ought to have been accorded the privilege of showing that the plaintiff's witness was mistaken with reference to the fact and that there was a general market value for such property. But passing this question for the present, the contention on behalf of the plaintiff is to the effect that it sold goods to be manufactured and delivered in the future; that it was the owner of a granite quarry, from which it quarried the blocks and shipped them to the place designated in the contract. Upon referring to the complaint we find that the allegation is that the defendant entered into an agreement whereby the plaintiff undertook and agreed to furnish the defendant and the defendant agreed to take from the plaintiff five hundred thousand granite paving blocks and agreed to pay therefor at the rate or price of sixty-two dollars per thousand. It will be observed that there is nothing in the complaint that charges that the blocks were to be manufactured in the future, or that they were to be taken from any particular quarry. They were simply to be granite paving blocks.

It appears from the evidence that the plaintiff did have a quarry, and that there had been previous negotiations between the parties, and at least two different contracts had been drawn and submitted for approval; but, under date of August 14, 1903, a letter was written on behalf of the defendant company to the treasurer of the plaintiff company, in which it is stated that "The contract signed by this Company on the second day of April, 1903, which was never executed by you, and which you have this day surrendered, will no longer be considered as an order for granite blocks to be furnished by your quarry." Apparently, this disposed of the negotiations that had theretofore taken place as to any order for granite from the plaintiff's quarry. Then the defendant's letter proceeded to make an independent order for "Five hundred thousand granite

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

block, subject to inspection as to quality and size, the size is length 8 to 12, width $3\frac{1}{2}$ to $4\frac{1}{2}$, depth 6 inches to 7 inches, one-half of the above to be delivered on or before April 1st, 1904, and the balance on or before June 1st, 1904, any blocks undelivered as above specified to be received only at the option of this Company. The delivery of these blocks to be made on such of this Company's docks in Brooklyn, N. Y., as we will from time to time designate, the price to be \$62 per thousand delivered on dock payable within thirty days after delivery." This order was accepted by the plaintiff company.

It will be observed that there is nothing in the new order specifying that the granite should be from the plaintiff's quarry or any other specified quarry. It merely calls for granite blocks of the sizes specified to be delivered upon the company's docks in Brooklyn. Neither is there any provision in the order requiring the blocks to be manufactured in the future from any specified character of granite. Indeed, there is nothing in its provisions that would prohibit the plaintiff from going into the market or to any granite quarry owner and purchasing the blocks called for by the contract and fulfill its part of the contract by delivering the blocks so purchased to the defendant at the docks specified. We, therefore, conclude that, reading the contract in connection with the allegation of the complaint that it was simply a contract for purchase and sale of an article of merchandise, and that, if it had a general market value at the time and at the place of delivery called for by the contract, the measure of damages would be the difference between the market value and the contract price. (*Todd v. Gamble*, 148 N. Y. 382.) We consequently conclude that the court erred in excluding the evidence offered on behalf of the defendant to show that there was a standard market value, and for that reason the judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, CH. J., EDWARD T. BARTLETT, VANN, HISCOCK and CHASE, JJ., concur; GRAY, J., absent.

Judgment reversed, etc.

GEORGE MILAGE, Respondent, v. CHARLES E. WOODWARD,
Appellant.

BREACH OF CONTRACT EMPLOYING CANAL BOAT FOR FIXED PERIOD — WHEN OWNER OF BOAT ENTITLED TO RECOVER FULL AMOUNT NAMED IN CONTRACT — BURDEN OF PROOF. Where it was provided by a written contract between a contractor and a boatman that the latter should furnish a canal boat with its crew, horses and necessary equipment for the purpose of drawing sand from one port to another for a period of four weeks at a specified sum per week, and the contractor, after the boatman had entered into the performance of the contract and had been engaged eight days in drawing sand, terminated the contract by a notice in writing upon the ground that the boatman had not complied with an oral agreement alleged to have been made before the execution of the written contract by which the boatman was to draw a certain amount of sand in a boatload and tendered the amount due up to that time, and the boatman, after notifying the contractor that the boat and crew would be held at his command during the time called for by the contract, waited until the expiration of that time and then brought an action for the full amount named therein, the plaintiff is not precluded from recovering the amount claimed upon the ground that he was entitled only to the amount earned at the time the contract was terminated because he admitted upon cross-examination that he had made no attempt to obtain work during the remainder of the contract period, where he also testified that the boat was moored in a public place where any one who desired to secure the transportation of goods on the canal would be likely to go; the plaintiff was not bound to show affirmatively that employment was sought for and could not be found; the burden of proof rested upon the defendant to show that the plaintiff had found or could have found employment elsewhere.

Milage v. Woodward, 105 App. Div. 627, affirmed.

(Argued October 11, 1906; decided October 23, 1906.)

APPEAL from a judgment entered June 5, 1905, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which reversed an order of Special Term granting a motion for a new trial after a verdict in favor of plaintiff and denied such motion.

The nature of the action and the facts, so far as material, are stated in the opinion.

Richard E. White for appellant. It being conceded by the plaintiff in his own testimony that he did not attempt to

N. Y. Rep.] Opinion of the Court, per EDWARD T. BARTLETT, J.

get any work after his discharge, he cannot recover damages for such discharge. (*Shannon v. Comstock*, 21 Wend. 462; *Huntington v. O. & L. C. R. R. Co.*, 33 How. Pr. 419; *Howard v. Daly*, 61 N. Y. 370; *Polk v. Daly*, 14 Abb. Pr. 160; *Ruland v. W. W. Co.*, 52 App. Div. 281; *Johnson v. Meeker*, 96 N. Y. 96; *Fuchs v. Koerner*, 107 N. Y. 530.)

W. A. Matson for respondent. The uncontradicted facts in the case, the entire testimony given upon the question of mitigation of damages, and all the facts and circumstances in the case, considered together, clearly show that plaintiff used reasonable diligence in mitigating the damage done him by defendant. (*Schneps v. Sturn*, 25 Misc. Rep. 168; *Crawford v. M. & E. P. Co.*, 22 App. Div. 54.) Even if plaintiff wholly failed to perform his duty to seek work, defendant must show affirmatively that similar work might have been obtained before he was entitled to any offset by way of mitigation of damages. (*King v. Steiren*, 44 Penn. St. 102; *Bank of Montgomery v. Reese*, 2 Casey, 146; *Wilkinson v. Feree*, 12 Harris, 190; *Howard v. Daly*, 61 N. Y. 371; *Merrill v. Blanchard*, 7 App. Div. 167; *Hamilton v. McPherson*, 28 N. Y. 77; *Griffin v. B. B. Club*, 68 App. Div. 576.)

EDWARD T. BARTLETT, J. It is to be remarked at the outset that this is not an action on contract for wages, or for a specified sum due under a written agreement. The plaintiff seeks in this action to recover damages for breach of contract. The complaint specifically alleges "that by reason of the wrongful and unlawful discharge of plaintiff by defendant the plaintiff sustained damage in the sum of \$240.00, no part of which has been paid."

"A servant wrongfully discharged has but two remedies growing out of the wrongful act: (1) He may treat the contract of hiring as continuing though broken by the master, and may recover damages for the breach. (2) He may rescind the contract, in which case he could sue on a *quantum*

Opinion of the Court, per EDWARD T. BARTLETT, J. [Vol. 186.

meruit for services actually rendered. These remedies are independent of, and additional to his right to sue for wages for sums actually earned and due by the terms of the contract." (*Howard v. Daly*, 61 N. Y. 362 at bottom of p. 369 and top of p. 370.) The plaintiff by bringing this action has elected to avail himself of the first remedy above stated.

The law applicable to the present case is very thoroughly reviewed in *Howard v. Daly* (*supra*), Commissioner DWIGHT writing a learned opinion.

In *Moody v. Leverich* (4 Daly, 401) the late Chief Justice CHARLES P. DALY wrote an opinion, reviewing the authorities, in a case where it was held that a servant wrongfully dismissed by his master is restricted either to an action to recover for the services actually rendered or to a general action for damages for the breach of the contract, in which he may recover any amount due for services and also compensation for damages sustained by the further breach of the contract in wrongfully dismissing him.

In *Heim v. Wolf* (1 E. D. Smith, 73) Judge WOODRUFF thus lays down the general rule: "Where an employer discharges a person from his employ he may wait until his wages become due and then recover them, but that rule is to be taken with restrictions. He recovers not for services rendered, but damages for breaking the contract by discharging him before the termination of his agreement — that is, for refusing to employ and pay him according to the contract. If it appears that he was idle and could not obtain other employment, his damages would be the whole compensation agreed upon, but if he obtains employment then he is entitled only to a partial recovery."

It appears that the plaintiff was a resident of the city of Rochester and the owner of a canal boat and three horses, the crew consisting of himself as captain and a driver; the plaintiff as captain of the boat supervised the work in which the outfit was employed.

On the 27th of July, 1903, the plaintiff and defendant entered into a contract in writing, whereby it was agreed in

N. Y. Rep.] Opinion of the Court, per EDWARD T. BARTLETT, J.

substance that the plaintiff was to furnish the canal boat, with its crew, three horses and all necessary equipment, to the defendant for the purpose of boating sand from the property of the defendant near Cartersville on the Erie canal to the city of Rochester. The defendant agreed to pay for the use of said boat, crew and equipment sixty dollars a week of six days, or if work was performed seven days per week the sum of sixty-three dollars. The term of the contract was fixed at four weeks beginning July 28th, 1903.

The defendant in his answer set up that there was an additional agreement, which on the trial was stated to be oral, to the effect that it was agreed on the part of the plaintiff that the loads of sand to be placed upon the boat should sink her in the water to the six-foot line and that the boat should be so loaded in order to constitute a boat load.

It is sufficient to say as to the alleged oral agreement that the defendant testified that during a conversation prior to the signing of the written contract he said to the plaintiff that he supposed he could load to the six-foot line, and the latter replied, "You can put on what you have a mind to, but my advice is not to put more in on one day than you can take off in the next." The defendant reiterated in his testimony that the conversation took place during the negotiations just prior to the signing of the written instrument.

It, therefore, follows under the familiar rule of law that all previous negotiations are merged in the written instrument and that the writing between the parties represents the entire contract. The course of the trial renders this point of little importance, as the attention of the learned trial judge was not called to the same, and he submitted the question to the jury as to whether the oral contract was made in addition to the written one, and the verdict being for the plaintiff it must be assumed that the jury found that no such contract was made, or, if made, it had not been violated for reasons that will presently appear.

The plaintiff, in pursuance of the contract, was engaged for a period of eight days in drawing sand for the defendant from

Opinion of the Court, per EDWARD T. BARTLETT, J. [Vol. 186.]

Cartersville to the city of Rochester, some three loads in all, when he received a letter from the defendant, dated August 5th, 1903, reading as follows: "As you have refused to draw the amount of sand to a load that I am entitled to, and in addition to that have signified your willingness for me to get some one else to do my boating, I have decided to terminate the contract entered into with you. You can get the \$80.00 due you by calling at my office."

On August 8th the counsel for plaintiff addressed a communication to the defendant, containing, among other things, the following: "The boat and crew are at your command, as you know, during the time called for in the contract, and at the expiration of that time we will ask you to pay the amount of the contract in behalf of Mr. Milage (plaintiff). If, in the meantime, you have any proposition of compromise so that the boat can be released and go to work, you can submit them to Mr. Milage, who will be with the boat, subject to your consent. Otherwise the boat is yours pursuant to the contract, and Mr. Milage will insist upon the contract price."

On August 14th the defendant replied to this last communication as follows: "Your favor regarding the George W. Milage matter came duly to hand. Have been out of town, or would have given your letter attention before. I can only say that I discharged Captain Milage for cause which I then considered and still consider sufficient."

The record clearly discloses that the only cause of difference between the parties was plaintiff's failure to load his boat with the sand in question to the six-foot line. As we have before pointed out, the plaintiff was under no obligation, by the terms of the written contract, to load his boat to the six-foot line; but, assuming that he was so obligated, there was a sharp conflict of evidence as to the reason for his failure to do so. The plaintiff testified that there was not a sufficient depth of water at the defendant's dock to permit loading to the six-foot line; that the effect of so doing would be to put the boat aground. This statement was controverted by defendant's foreman. As the jury found for the full amount

N. Y. Rep.] Opinion of the Court, per EDWARD T. BARTLETT, J.

of damages claimed, it must be assumed that they also reached the conclusion that there was no sufficient ground for the defendant to terminate the contract.

This leaves the main question on this appeal to be considered. It is contended by the defendant that the plaintiff rested under the obligation, after his discharge, to make a reasonable effort to secure employment elsewhere in order to reduce the amount of damages he might sustain by reason of the termination of the contract; and having failed to do so the recovery of any sum, in addition to the sum of eighty dollars admitted to be due for services actually rendered, constituted legal error. This seems to have been the view of the learned trial judge, as he granted defendant's motion for a new trial unless the plaintiff consented to reduce his recovery to the sum of eighty dollars. The Appellate Division rendered judgment for damages in the full amount called for by contract, two hundred and forty dollars.

The contract in this case is not one for personal services exclusively, as was the fact in many of the authorities cited, but was an agreement for the personal services of the plaintiff as captain, together with the use of his boat and driver in a special business of transporting property on the Erie canal. It is doubtless the law that the obligation of a plaintiff to reasonably reduce, if possible, the damages a defendant may suffer by reason of breach of contract is not alone applicable to contracts of service. (*Emmens v. Elderton*, 4 H. L. Cas. 646; *Costigan v. Mohawk & H. R. R. Co.*, 2 Denio, 609; *Dillon v. Anderson*, 43 N. Y. 231; *Hamilton v. McPherson*, 28 N. Y. 76.)

In an action to recover damages for breach of contract, *prima facie* the plaintiff is damaged to the extent of the amount stipulated to be paid. (*Howard v. Daly*, 61 N. Y. 362, 371.) At the page last cited this court said: "The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere or that other and similar employment has been offered and declined, or at least that such employment might have been found. I do not

Opinion of the Court, per EDWARD T. BARTLETT, J. [Vol. 186.]

think that the plaintiff is bound to show affirmatively, as a part of her case, that such employment was sought for and could not be found. (2 Greenleaf on Evidence, § 261a; *Costigan v. M. & H. R. R. Co.*, 2 Denio, 609.)”

The appellant insists that he was relieved from assuming this burden of proof for the reason that the plaintiff admitted when on the witness stand that he had made no effort to obtain employment. It is true that on cross-examination the plaintiff was asked if he made an attempt to get work and he replied, “No, sir.” The plaintiff, however, is entitled to the effect of his entire examination, direct and cross. It seems that he not only notified the defendant that during the balance of the four weeks of employment—a period of twenty days only—he would hold the boat ready to perform the contract, but that she was moored in a public place or basin in the city of Rochester, where any one desiring to secure the employment of a captain and his boat would naturally apply. The plaintiff testified: “My boat was on the canal and my horses and everything was there, and no work was offered to me in any way; there was no chance to do anything. I took care of my horses and attended to my boat, and stayed there in readiness for the man if he wanted the boat to go on. * * * I stayed there in Rochester with my boat all the time. I did not see anything at that time anywheres where I could do any work.”

The circumstances of this case are somewhat peculiar; the total period of employment was for only four weeks; the plaintiff had worked eight days under the contract, leaving only a balance of twenty days to complete performance; his business was that of a boatman on the canal, and it was more difficult for him to secure additional employment than would be the case of an ordinary clerk or employee. The fact that the boat was moored at a public place in the city of Rochester, where it would be natural for any one to go who desired to secure transportation of goods on the canal, is sufficient. It certainly cannot be successfully asserted that the plaintiff, in view of these facts, admitted that he made no effort to secure

N. Y. Rep.]

Statement of case.

employment. It was no part of his affirmative case to go further.

Upon breach by an employer of a contract of employment, by a discharge of the employee before the expiration of his term of service, the latter is only bound to use reasonable diligence to procure other employment of the same kind in order to relieve the employer as much as possible from loss consequent upon the breach; he is not bound to look for or accept occupation of another kind. (*Fuchs v. Koerner*, 107 N. Y. 529.) It is clear that the defendant did not sustain the burden of proof resting upon him to show that the plaintiff had found or could have found employment elsewhere.

It follows that the defendant was guilty of a breach of the written contract between himself and the plaintiff, and that the latter having elected to sue for the resulting damages was entitled to recover, as such, the amount stipulated to be paid him thereunder.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., HAIGHT, VANN and CHASE, JJ., concur;
GRAY, J., absent; HISCOCK, J., not sitting.

Judgment affirmed.

GEORGE P. BUTLER, Appellant, v. RICHARD H. WRIGHT,
Respondent.

APPEAL — ERRONEOUS REVERSAL BY APPELLATE DIVISION OF JUDGMENT DIRECTING SPECIFIC PERFORMANCE — CODE CIV. PRO. § 1838. The question whether a party is entitled to the specific performance of an executory contract relating to personal property, or should be confined to an action at law to recover damages for a breach, rests in the sound discretion of the court; and upon an appeal from a judgment directing specific performance entered upon the report of a referee, although the Appellate Division in the exercise of its discretion may reverse upon the facts, where its order of reversal is silent as to the grounds thereof it must be assumed to have been based upon questions of law only; and if no error of law appears and there is evidence to sustain the findings of fact by the referee, the judgment must be affirmed.

Butler v. Wright, 108 App. Div. 483, reversed.

(Argued October 15, 1906; decided October 26, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 20, 1905, reversing a judgment in favor of plaintiff entered upon the report of a referee and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles F. Mathewson, Benjamin S. Harmon and Edward J. Patterson for appellant. There being evidence in support of each of the referee's findings of fact, the same are conclusive in this court. (*Ogden v. Alexander*, 140 N. Y. 356; *First Nat. Bank v. Chalmers*, 144 N. Y. 432; *Marvin v. B. I. M. Co.*, 55 N. Y. 538.) Plaintiff is entitled to a specific performance of the contract. (*Cushman v. T. M. J. Co.*, 76 N. Y. 365; *Wister v. Lawson*, 44 App. Div. 635; *Adams v. Messinger*, 147 Mass. 185; *Jones v. Brown*, 171 Mass. 318; *N. E. T. Co. v. Abbott*, 162 Mass. 148; *Frue v. Houghton*, 6 Col. 318; *Krouse v. Woodward*, 110 Cal. 638; *Goodwin's Appeal*, 117 Penn. St. 514; *Reilly v. Freeman*, 1 App. Div. 560; *Clarke v. Rochester Co.*, 18 Barb. 350; *Sternberger v. McGovern*, 56 N. Y. 12.)

Delos McCurdy for respondent. The complaint does not state, and the proof does not show, a case for the specific performance of this contract. (Pomeroy on Spec. Perf. § 14; Fry on Spec. Perf. § 66; Story's Eq. Juris. § 724; Bispham's Prin. of Equity, § 368; *Stanton v. Percival*, 5 H. L. Cas. 257-268; *Cowles v. Whitman*, 10 Conn. 121; *McGowan v. Remington*, 12 Penn. St. 56; *Cushman v. T. Mfg. Co.*, 76 N. Y. 365; *Johnson v. Brooks*, 93 N. Y. 337; *Kennedy v. Thompson*, 97 App. Div. 296; *Bateman v. Straus*, 86 App. Div. 540; *Bedford v. A. A. Co.*, 51 App. Div. 538; *Folt's Appeal*, 91 Penn. St. 434; *Matter of Argus Co.*, 138 N. Y. 557.)

HAIGHT, J. This action was brought to compel the specific performance of a contract for the purchase and sale of stock. The contract upon which the action is based was to the effect

that the plaintiff agreed to procure and turn over to the defendant all of the capital stock of the Economy Packing Company, a New Jersey corporation, and that the defendant agreed to pay therefor by delivering to the plaintiff five hundred shares of the capital stock of the Wright's Automatic Tobacco Packing Machine Company, a West Virginia corporation.

The chief question of fact litigated upon the trial was the alleged false and fraudulent representations made by the plaintiff to the defendant, by which he was induced to enter into the contract. But this issue was found by the referee in favor of the plaintiff, thus disposing of that branch of the case so far as this court is concerned. The complaint further alleged, in substance, and the referee has found as facts, that the stock of the Wright Company had never been listed on any exchange or had any quoted value or any definite market price or any certain value capable of exact ascertainment; that the defendant was the owner of at least ninety-two per cent of the stock and controlled the balance. Upon these facts the referee found that the plaintiff had no adequate remedy at law, and, therefore, ordered specific performance of the contract. To these conclusions appropriate exceptions were taken by the defendant. The Appellate Division has reversed the judgment entered upon the report of the referee and ordered a new trial. The order of reversal does not specify the ground, and, therefore, under section 1338 of the Code of Civil Procedure, we are required to presume that the judgment was not reversed or the new trial granted upon a question of fact.

It will be observed that the agreement which the plaintiff seeks to have specifically performed was in its character executory, and that, upon its breach, the plaintiff had the right to resort to such remedy as the law afforded, and the question now arises as to whether a court of equity should entertain jurisdiction and compel specific performance, or whether he should be remitted to a court at law to recover the damages which he has sustained. The rule is that, as to contracts per-

taining to personal property, a party should be confined to his action for damages, unless it appears that he is entitled to the thing contracted for in specie, which to him has some special value and which he cannot readily obtain in the market, or in cases where it is apparent that compensation in damages would not furnish a complete and adequate remedy. But in each case the question as to whether a court of equity will take jurisdiction and grant the relief asked for rests in the sound discretion of the court and it cannot be demanded as a matter of right. (*Johnson v. Brooks*, 93 N. Y. 337; *Matter of Petition of Argus Co.*, 138 N. Y. 557, 572; *Williams v. Montgomery*, 148 N. Y. 519; *Bomeisler v. Forster*, 154 N. Y. 229; *Lighthouse v. Third Nat. Bank*, 162 N. Y. 336.) The question, therefore, that was presented to the Appellate Division for its determination was one calling for the exercise of its sound discretion, and this discretion was to be exercised upon a consideration of the facts and circumstances disclosed by the record in the case. That court, as we have seen, has reversed the judgment. While it cannot be said, as matter of law, that there was no evidence to sustain the findings of fact by the referee, it was authorized to reverse, in its discretion, upon a consideration of the facts, but it was not bound or authorized to do so as a question of law. The difficulty is that the court, in its order of reversal, has failed to state that the reversal is based upon the facts or in the exercise of its discretion. Under the provisions of the Code alluded to, we are compelled to assume that it was reversed upon the law only. This cannot be sustained, and it follows that the order of the Appellate Division must be reversed and judgment entered upon the report of the referee affirmed, with costs in all the courts.

CULLEN, Ch. J., VANN, WILLARD BARTLETT and HISCOCK, JJ., concur; WERNER, J., dissents; GRAY, J., absent.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THOMAS C. QUINN, Respondent, v. JOHN R. VOORHIS et al., Composing the Board of Elections of the City of New York, Appellants.

APPEAL — MANDAMUS — APPELLATE DIVISION — ERRONEOUS DISMISSAL OF APPEAL FROM AN ORDER GRANTING A PEREMPTORY WRIT OF MANDAMUS. It is erroneous for the Appellate Division to dismiss an appeal from a final order granting a writ of peremptory mandamus directing the defendants, as the board of elections of the city of New York, to perform certain acts, even though the defendants had obeyed the writ in part by performing some of the acts which they were commanded to perform, where the duty imposed upon them is continuous and will not be completed until election day; since a party affected by an order commanding him to do an act retains the right to appeal therefrom so long as the effect of the order may be to constrain his action in the future.

People ex rel. Quinn v. Voorhis, 115 App. Div. 118, reversed.

(Argued October 25, 1906; decided October 26, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 19, 1906, which dismissed an appeal from an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendants to designate certain newspapers in which to publish election notices pursuant to section 10 of the Election Law.

After the appeal had been taken to the Appellate Division, the relator made a motion to dismiss it, on the ground that the board of elections had, at the time of taking the appeal, already complied with the provisions of the peremptory writ of mandamus. This motion was granted by a divided court. The questions certified are stated in the opinion.

William B. Ellison, Corporation Counsel (*Arthur C. Butts*, *Terence Farley* and *Thomas F. Noonan* of counsel), for appellants. The board of elections of the city of New York having been compelled by the compulsory mandate of

the court to act, and thereby create expense for the city of New York under an order which they affirm was erroneously granted, and under which further expense is still to be incurred, said board of elections has the right to its day in court on appeal from said order. (*Matter of Emmet*, 150 N. Y. 538.) The act or acts to be done under the order granting a peremptory mandamus must be considered with the order to determine whether the act or acts commanded to be performed thereunder have been completely performed. (*People ex rel. T. T. S. Ry. Co. v. Squire*, 110 N. Y. 666.) The board of elections was not obliged to place itself in contempt of court by refusing to obey the order of the court below even if it believed said order to have been erroneously granted. It had a right to rely upon an appeal to the court and the reversal of such erroneous order. (L. 1901, ch. 95.)

Otto T. Hess and *Thomas W. Churchill* for respondent. The appeal was properly dismissed. (*People ex rel. T. T. S. Ry. Co. v. Squire*, 110 N. Y. 666; *Matter of Manning*, 139 N. Y. 448; *People ex rel. Geer v. Common Council of Troy*, 82 N. Y. 575.)

Per Curiam. Two questions are certified to us as follows: “(1) Was it error to dismiss an appeal to the Appellate Division from a final order granting a peremptory mandamus where the defendants have obeyed the writ by completely performing the acts which they were commanded to perform? (2) If it was error to dismiss such appeal, was the mandamus properly granted upon the papers presented to the Special Term?”

We decline to consider the second question, as the merits of this controversy are not before us.

We are of opinion that it was error on the part of the Appellate Division to dismiss the appeal from the final order granting a peremptory writ of mandamus even though the defendants had obeyed the writ in part by performing some of the acts which they were commanded to perform.

We do not answer the first question as framed, where it states that "the defendants have obeyed the writ by completely performing the acts," etc., as the duty imposed upon the board of elections under the statute is continuous and will not be completed until election day, for the board is required to cause to be published notices of the election on various days, some of which are still future.

It is a well-recognized principle that a party affected by an order commanding him to do an act retains the right to appeal therefrom so long as in the future the effect of the order may be to constrain his action.

The principle has recently been decided in this court in the cases of three policemen, argued together (*People ex rel. Hurlbut, Reardon and Kenny v. Bingham, as Police Commissioner of the City of New York*) decided October 2d, 1906 (186 N. Y. 522, 523), where we denied relators' motions to dismiss the appeals from orders of the Appellate Division in the second department, which affirmed orders granting relators' motions for writs of peremptory mandamus, directing their restoration to the police force, on the ground that the commissioner had complied with the orders, and the questions were, therefore, academic. In denying these motions we held that the commissioner had a right to appeal, as the effect of the writs was to continue the relators in office.

The order appealed from should be reversed, without costs, and the proceedings remitted to the Appellate Division.

First question certified answered as stated herein.

Second question not answered.

CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur; GRAY, J., absent.

Order reversed, etc.

- No. 1. In the Matter of the Application of EDWARD J. HANNAH, Appellant; MARK GOLDBERG, Respondent.
- No. 2. In the Matter of WILLIAM S. BENNETT, Respondent; FRANCIS E. SHOBER, Appellant.
- No. 3. In the Matter of the Application of MARTIN SAXE, Respondent; SHERMAN S. MORNAND, Appellant.
- No. 4. In the Matter of the Application of CHARLES W. LEFFLER, Respondent; CHARLES V. FORNES, Appellant.
- No. 5. In the Matter of the Application of SAMUEL HOFFMAN, Respondent; WILLIAM SOHMER, Appellant.
- No. 6. In the Matter of the Application of CHARLES S. ADLER, Respondent; HENRY M. GOLDFOGLE, Appellant.
- No. 7. In the Matter of the Application of THOMAS GLOSTER, Appellant, Relative to Nominations for Member of Assembly from the Eleventh Assembly District.
- No. 8. In the Matter of the Application of GODFREY LEHNER, Appellant, Relative to Nominations for Member of Assembly from the Fifth Assembly District.
- No. 9. In the Matter of the Application of THOMAS F. LONG, Respondent; JOHN T. EAGLETON, Appellant.
- No. 10. In the Matter of the Application of THOMAS F. LONG, Appellant, Relative to Nominations for Senator from the Thirteenth Senatorial District.
- No. 11. In the Matter of the Application of THOMAS F. LONG, Respondent, Relative to Nominations for Senator from the Thirteenth Senatorial District.
- No. 12. In the Matter of the Application of FRANKLIN QUIMBY, Appellant, Relative to Nominations for Member of Congress from the Eighth Congressional District.
- No. 13. In the Matter of the Application of SAMUEL E. TERRY, Appellant, Relative to Nominations for Member of Assembly from the Thirty-fourth Assembly District.

N. Y. Rep.]

Statement of case.

- No. 14. In the Matter of the Application of CHARLES H. HUSSEY, Appellant, Relative to Nominations for Member of Assembly from the Ninth Assembly District.
- No. 15. In the Matter of the Application of WILLIAM A. KERNS, Appellant, Relative to Nominations for Member of Assembly from the Thirty-second Assembly District.
- No. 16. In the Matter of the Application of THOMAS ROCK, Appellant; THOMAS F. GRADY, Respondent.
- No. 17. In the Matter of the Application of THOMAS ROCK, Respondent; THOMAS F. GRADY, Appellant.
- No. 18. In the Matter of the Application of CHARLES E. GEHRING, Respondent; THOMAS F. GRADY, Appellant.
- No. 19. In the Matter of the Application of WILLIAM B. LOGAN; HARRY B. DAVIS, Appellant; FRANCIS B. HARRISON, Respondent.
- No. 20. In the Matter of the Application of WILLIAM B. LOGAN; HARRY B. DAVIS, Appellant; JAMES B. FRAWLEY, Respondent.
- No. 21. In the Matter of the Application of WILLIAM B. LOGAN; SAMUEL GREENBERG, Appellant; LEOPOLD PRINCE, Respondent.
- No. 22. In the Matter of the Application of WILLIAM B. LOGAN; FREDRICK D. RILEY, Appellant; JAMES V. GAULY, Respondent.
- No. 23. In the Matter of the Application of HARRY B. DAVIS, Appellant, Relative to Nominations for Member of Congress from the Sixteenth Congressional District.
- No. 24. In the Matter of the Application of JAMES A. LYON, Appellant, Relative to Nominations for Senator from the Twentieth Senatorial District.
- No. 25. In the Matter of the Application of SAMUEL GREENBERG, Appellant, Relative to Nominations for Member of Assembly from the Twenty-sixth Assembly District.

- No. 26. In the Matter of the Application of **FREDERICK D. RILEY**, Appellant, Relative to Nominations for Member of Assembly from the Twenty-fourth Assembly District.
- No. 27. In the Matter of the Application of **GUSTAV H. BREVILLIER**, Appellant, to Review the Determination of the Board of Elections of the City of New York on Objections to the Nominations of **MATTHEW P. BREEN** et al., Respondents, for Justices of the Supreme Court, and **OTTO A. ROSALSKY**, Respondent, for Judge of the Court of General Sessions in the City of New York.
- No. 28. In the Matter of the Application of **GUSTAV H. BREVILLIER**, Appellant, to Review the Determination of the Board of Elections of the City of New York on Objections to the Nominations of **LEONARD A. GEIGERICH** et al., Respondents, for Justices of the Supreme Court.
- No. 29. In the Matter of the Application of **GUSTAV H. BREVILLIER**, Appellant, to Review the Determination of the Board of Elections of the City of New York on Objections to the Nomination of **JOHN J. BRADY**, Respondent, for the Office of Justice of the Supreme Court.
- No. 30. In the Matter of the Objections of **CHARLES E. GEHRING**, Respondent, to a Petition Nominating **FRANCIS S. McAVOY**, Appellant, as a Candidate for Justice of the Supreme Court.
- No. 31. In the Matter of the Application of **JOSEPH B. CUNNINGHAM** to Review the Determination of the Board of Elections of the City of New York Relative to the Independent Nomination of **LESLIE J. TOMPKINS**, Appellant, as Candidate for Member of Assembly from the Twenty-fifth Assembly District; **FRANK HENDRICK**, Respondent.

1. ELECTION LAW — CERTIFICATE FOR INDEPENDENT NOMINATION VALID, ALTHOUGH MADE FOR THE NOMINATION OF MORE THAN ONE CANDIDATE. When certificates for independent nominations, made and filed under the provisions of the Election Law (L. 1896, ch. 909, §§ 57, 58 and 59), are required to be filed in the same office, one of such certificates

N. Y. Rep.]

Statement of case.

is not invalid because made for the nomination of more than one candidate where the electors making it are qualified to make a certificate for the nomination of all of the candidates mentioned therein.

2. INDEPENDENT NOMINATION FOR MEMBER OF ASSEMBLY — WHETHER NOMINEE DISQUALIFIED BECAUSE HE IS A COMMISSIONER OF DEEDS MUST BE DETERMINED BY ASSEMBLY IF HE BE ELECTED. The question whether a person nominated in a certificate for an independent nomination is disqualified from election as a member of assembly because he is a commissioner of deeds cannot be determined in a proceeding to review a determination of the board of elections of the city of New York as to the validity of a certificate of nomination, but must be left to the assembly to determine in case of his election.

3. CONTEST BETWEEN SEVERAL SETS OF LOCAL INDEPENDENCE LEAGUE NOMINATIONS — WHEN CERTIFICATE FIRST FILED IS ENTITLED TO PREFERENCE. Where there is a contest between several sets of local Independence League nominations the certificate first filed under that title is entitled to preference, provided that, under the provisions of section 56 of the Election Law, it was filed by the same "independent body" which had made the state nominations. Whether the electors who joined in the first certificate or those who made the second certificate were the same "independent body" presents a question of fact on which the Court of Appeals is concluded by the decisions of the courts below.

(Argued October 30, 1906; decided October 30, 1906.)

APPEAL in the first above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term and sustained a decision of the board of elections of the city of New York in refusing to place the name of Edward J. Hannah on the official ballot as candidate for member of assembly for the eighteenth assembly district in the county of New York.

David B. Hill, Herbert R. Limburg and Edward J. Gavegan for appellant.

Daniel F. Cohalan, John F. Dooling and Mark Goldberg for respondent.

Appeal in the second above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which

reversed an order of Special Term and directed that the name of Francis E. Shober should not appear upon the official ballot as a candidate for member of congress from the seventeenth congressional district, except in the Democratic column.

David B. Hill, Daniel F. Cohalan and Herbert R. Limburg for appellant.

Abraham S. Gilbert for respondent.

Appeal in the third above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term and directed that the name of Sherman S. Mornand should not appear upon the official ballot as a candidate for senator from the eighteenth senatorial district, except in the Democratic column.

David B. Hill, Daniel F. Cohalan and Herbert R. Limburg for appellant.

Abraham S. Gilbert for respondent.

Appeal in the fourth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term and directed that the name of Charles V. Fornes should not appear on the official ballot as a candidate for member of congress from the eleventh congressional district, except in the Democratic column.

David B. Hill, Daniel F. Cohalan and Herbert R. Limburg for appellant.

Abraham S. Gilbert for respondent.

Appeal in the fifth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term and directed that the name of

N. Y. Rep.]

Statement of case.

William Solmer should not be placed upon the official ballot as a candidate for senator from the twelfth senatorial district, except in the Democratic column.

David B. Hill, Daniel F. Cohalan and Herbert R. Limburg for appellant.

Abraham S. Gilbert for respondent.

Appeal in the sixth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term and directed that the name of Henry M. Goldfogle should not appear upon the official ballot as a candidate for member of congress from the ninth congressional district, except in the Democratic column.

Louis Marshall and Charles L. Cohn for appellant.

Abraham S. Gilbert for respondent.

Appeal in the seventh above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Herbert R. Limburg for appellant.

Daniel F. Cohalan for respondent.

Appeal in the eighth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Herbert R. Limburg for appellant.

Daniel F. Cohalan for respondent.

Appeal in the ninth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term and directed that the name of John F. Eagleton should not appear upon the official ballot as a candidate for member of assembly from the fifth assembly district, except in the Democratic column.

Daniel F. Cohalan and *John T. Dooling* for appellant.

Herbert R. Limburg for respondent.

Appeal in the tenth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Herbert R. Limburg for appellant.

Daniel F. Cohalan for respondent.

Appeal in the eleventh above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Daniel F. Cohalan and *John T. Dooling* for appellant.

Herbert R. Limburg for respondent.

Appeal in the twelfth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Herbert R. Limburg and *Edward J. Gavegan* for appellant.

Daniel F. Cohalan for respondent.

N. Y. Rep.]

Statement of case.

Appeal in the thirteenth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Herbert R. Limburg for appellant.

Daniel F. Cohalan for respondent.

Appeal in the fourteenth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed an order of Special Term denying the application herein.

Herbert R. Limburg for appellant.

Daniel F. Cohalan for respondent.

Appeal in the fifteenth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Herbert R. Limburg for appellant.

Daniel F. Cohalan for respondent.

Appeal in the sixteenth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term sustaining objections to an independent certificate purporting to nominate the petitioner as a candidate for senator from the fourteenth senatorial district.

Michael J. Joyce, Edward J. Gavegan and *Herbert R. Limburg* for appellant.

Daniel F. Cohalan and *Thomas F. Grady* for respondent.

Appeal in the seventeenth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term overruling objections to an independent certificate purporting to nominate the appellant herein as a candidate for senator from the fourteenth senatorial district, and directed that his name should not appear upon the official ballot, except in the Democratic column.

Daniel F. Cohalan and *Thomas F. Grady* for appellant.

Michael J. Joyce, *Edward J. Gavegan* and *Herbert R. Limburg* for respondent.

Appeal in the eighteenth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term overruling objections to an independent certificate purporting to nominate *Thomas F. Grady* as a candidate for senator from the fourteenth senatorial district and directed that his name should not appear upon the official ballot, except in the Democratic column.

Daniel F. Cohalan and *Thomas F. Grady* for appellant.

Michael J. Joyce, *Edward J. Gavegan* and *Herbert R. Limburg* for respondent.

Appeal in the nineteenth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term directing the name of *Francis B. Harrison* to be placed upon the official ballot as an independent candidate for member of congress from the sixteenth congressional district.

Edward Hymes and *Henry S. Dottenheim* for appellant.

Daniel F. Cohalan and *John T. Dooling* for respondent.

N. Y. Rep.]

Statement of case.

Appeal in the twentieth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term directing the name of James B. Frawley to be placed upon the official ballot as a candidate for senator from the twentieth senatorial district.

Edward Hymes and *Henry S. Dottenheim* for appellant.

Daniel F. Cohalan and *John T. Dooling* for respondent.

Appeal in the twenty-first above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term directing the name of Leopold Prince to be placed upon the official ballot as a candidate for assembly from the twenty-sixth assembly district.

Edward Hymes and *Henry S. Dottenheim* for appellant.

Daniel F. Cohalan and *John T. Dooling* for respondent.

Appeal in the twenty-second above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term directing the name of James V. Gauly to be placed upon the official ballot as an independent candidate for member of assembly from the twenty-fourth assembly district.

Edward Hymes and *Henry S. Dottenheim* for appellant.

Daniel F. Cohalan and *John T. Dooling* for respondent.

Appeal in the twenty-third above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Edward Hymes and Henry S. Dottenheim for appellant.

Daniel F. Cohalan and John T. Dooling for respondent.

Appeal in the twenty-fourth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Edward Hymes and Henry S. Dottenheim for appellant.

Daniel F. Cohalan and John T. Dooling for respondent.

Appeal in the twenty-fifth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term denying the application herein.

Edward Hymes and Henry S. Dottenheim for appellant.

Daniel F. Cohalan and John T. Dooling for respondent.

Appeal in the twenty-sixth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 26, 1906, which affirmed an order of Special Term denying the application herein.

Edward Hymes and Henry S. Dottenheim for appellant.

Daniel F. Cohalan and John T. Dooling for respondent.

Appeal in the twenty-seventh above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which affirmed an order of Special Term overruling the objections to the independent nominations of the respondents herein.

N. Y. Rep.]

Statement of case.

Charles L. Jones for appellant.

R. Burnham Moffat, Daniel F. Cohalan, Frank S. Black
and *Melvin G. Palliser* for respondents.

Appeal in the twenty-eighth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 26, 1906, which reversed an order of Special Term and directed that the names of the respondents be placed upon the official ballot under a separate name and emblem, but not under the name and emblem of the Independence League.

Charles L. Jones for appellant.

R. Burnham Moffat and *Daniel F. Cohalan* for respondents.

Appeal in the twenty-ninth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term and directed that the name of John J. Brady be placed upon the official ballot in a separate column, but not under the name and emblem of the Independence League.

Herbert R. Limburg and *Melvin G. Palliser* for appellant.

Charles L. Jones for respondent.

Appeal in the thirtieth above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term, sustained the objections herein and directed that the name of Francis S. McAvoy be placed on the official ballot in a separate column.

R. Burnham Moffat and *Daniel F. Cohalan* for appellant.

Herbert R. Limburg, Melvin G. Palliser and *Frank S. Black* for respondent.

Appeal in the thirty-first above-entitled proceeding from an order of the Appellate Division of the Supreme Court in the first judicial department, made October 26, 1906, which reversed an order of Special Term and dismissed the proceeding herein.

A. Welles Stump for appellant.

William H. Wadhams for respondent.

Per Curiam. Six of the appeals before us are from orders of the Appellate Division reversing on the law, only, decisions of the Special Term. The sole question involved in these appeals is whether, when certificates for independent nominations are required to be filed in the same office, any one of such certificates shall be held invalid, because it is made for the nomination of more than one candidate; the electors making it being qualified to make a certificate for the nomination of all of the candidates mentioned therein.

We find nothing in the statute which forbids nominating certificates of this character; nor does there seem to be any practical ground which would be fatal to their validity. This is in accordance with repeated decisions of this court and of the Appellate Division, that the Election Law should be construed liberally to give effect to the will of the people. These views lead to a reversal of the order of the Appellate Division in these cases and to the affirmance of the order of the Special Term.

The foregoing relates to :

Matter of the Application of Edward J. Hannah,
Matter of the Application of William S. Bennett,
Matter of the Application of Martin Saxe,
Matter of the Application of Charles W. Leffler,
Matter of the Application of Samuel Hoffman, and
Matter of the Application of Charles S. Adler.

In certain of the other cases the order of the Appellate Division is based upon the ground that the party appealing to the Special Term from the determination of the board of

N. Y. Rep.]

Opinion *Per Curiam*.

elections had no sufficient standing for that purpose; not being a party to the proceeding. In this view of the Appellate Division we concur; it being in accordance with our previous decision in *Matter of Social Democratic Party*, (182 N. Y. 442).

As to the question raised in one of the appeals, (*Matter of the Application of Samuel E. Terry*), that the person nominated would be disqualified from election as a member of assembly, because a commissioner of deeds, we are of opinion that that question cannot be determined in proceedings with reference to the certificate of nomination, but must be left to the assembly to determine in case of his election. The case of *People ex rel. Sherwood v. State Board of Canvassers*, (129 N. Y. 360), decides, only, that the court will not give a disqualified candidate affirmative relief; but it does not authorize such a proceeding as this to have a nomination declared invalid.

In the appeals relating to the nominations for judicial officers we concur in the opinion of the Appellate Division that Mr. John J. Brady could not, under the statute, be placed in the column under the emblem of the Independence League.

As to the contest between the several sets of Independence League nominations, we are of opinion that the certificate first filed under that title was entitled to preference; provided that, under the provisions of section 56 of the Election Law, it was filed by the same "independent body" which had made the state nominations. Whether the electors who joined in the first certificate, or those who made the second certificate, were the same "independent body," presented a question of fact on which the decisions of the courts below conclude us.

In the remaining cases we are of opinion, despite the forceful arguments on behalf of some of the appellants, that the objections filed raised issues of fact, the determination of which rested with the board of elections, subject to review by the Supreme Court in both branches. With such determination we cannot interfere, as the order in each of these cases is silent as to the grounds upon which it proceeds. Therefore, it

may have been based on a question of fact and we are precluded from reviewing it. This principle is equally applicable to a case where the Appellate Division has reversed, as to one where it has affirmed.

It follows that in all the other appeals, save the six cases first mentioned, the order of the Appellate Division must be affirmed.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur.

Ordered accordingly.

In the Matter of the Petition of GINO C. SPERANZA,
Respondent, to Enforce an Attorney's Lien.

CHARLES WALSH, Appellant.

ATTORNEY AND CLIENT—ERRONEOUS ENFORCEMENT OF ATTORNEY'S LIEN FOR SERVICES. A proceeding to enforce an attorney's lien for services, upon a judgment recovered in an action for personal injuries suffered by his client, in which the issue is whether or not the agreement under which the attorney claims compensation is champertous, should not be summarily determined upon the petition and affidavits presented by the parties, where, although the agreement as set forth in the petition and affidavit of the attorney is not champertous, the client alleges that there was another agreement by which the attorney agreed to pay the expenses of the litigation if the client would sign the agreement fixing the attorney's compensation. The issue presented should not be determined until there has been a complete and thorough hearing of all the facts, either in open court or before a referee.

Matter of Speranza, 114 App. Div. 918, reversed.

(Argued October 2, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which affirmed an order of Special Term determining the amount of and directing the enforcement of an attorney's lien.

The facts, so far as material, are stated in the opinion.

Benjamin Patterson for appellant. The Special Term erred in determining the questions at issue between the attor-

N. Y. Rep.] Opinion of the Court, per WERNER, J.

ney and client without trial, reference or other judicial investigation. (Code Civ. Pro. §§ 3333, 3334; *Matter of Fitzsimons*, 174 N. Y. 15; *Matter of H —*, an Attorney, 87 N. Y. 521; *C. T. Co. v. Smith*, 57 Hun, 176; *Matter of King*, 168 N. Y. 53; *Matter of Knapp*, 85 N. Y. 284; *Fischer-Hansen v. B. H. R. R. Co.*, 173 N. Y. 492; *Sullivan v. Fox*, 113 App. Div. 61; *City of Philadelphia v. P. T. Co.*, 1 App. Div. 387.) The "inducement" prohibited by section 74 of the Code of Civil Procedure was made by the attorney, and, therefore, the contract based thereon is champertous and void. (*Steadwell v. Hartman*, 74 App. Div. 126; *Begley v. Weddigen*, 86 App. Div. 629; *Ransom v. Cutting*, 112 App. Div. 150; *Matter of Clark*, 184 N. Y. 222; *Irwin v. Curie*, 171 N. Y. 409; *Herschbach v. Ketchum*, 5 App. Div. 324; *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443.)

Archibald C. Shenstone for respondent. The appellant Walsh entered freely into a lawful and binding contract with his attorney. (*Fowler v. Callan*, 102 N. Y. 395; *Ransom v. Cutting*, N. Y. L. J. April 25, 1906.)

WERNER, J. This is a controversy between attorney and client over the terms of the contract of retainer. Upon conflicting averments made by the opposing affiants, the court at Special Term fixed the attorney's lien and directed its enforcement. At the Appellate Division that determination was unanimously affirmed. In view of that affirmance we shall refer to the facts, not for the purpose of reviewing them, but simply to support our suggestion that this is a case in which the dispute between attorney and client should not have been summarily disposed of by the court upon the petition and affidavits unsupported by any common-law evidence. As that is the precise point upon which our decision turns, it may not be out of place to preface our *resumé* of the facts with the statement that while all of our courts are proverbially and properly solicitous for the enforcement of the just claims of

lawyers against their clients, the latter have rights of equal importance and sacredness which should not be overlooked or ignored.

In the latter part of the year 1901 the petitioner respondent, Gino C. Speranza, an attorney-at-law, was employed by the appellant Charles W. Walsh, to prosecute a claim against the city of New York arising out of injuries sustained by Walsh in slipping and falling on ice formed on one of the highways of that city. Pursuant to this retainer Speranza brought an action in favor of Walsh against the city, which subsequently resulted in a verdict for the plaintiff in the sum of \$12,500. At the Appellate Division this recovery was reduced to \$7,500 and judgment for that amount, with interest and costs, was entered, making a total of \$7,702.04. Thereafter a disagreement arose between Speranza and Walsh, and the latter employed another attorney to collect the judgment. Then Speranza filed a notice of his lien for compensation with the comptroller of the city of New York, and later commenced this proceeding to enforce the same. Attached to his petition and made a part thereof, is a written instrument signed by Walsh whereby the latter agreed "to pay to said Speranza for such services a sum of money equal to forty per cent (40%) on the first \$10,000, and twenty-five per cent (25%) of any amount over said \$10,000 of the net amount of money which I may recover from said city for said injuries; or, if the action is settled before trial, twenty-five per cent (25%) on the net amount of such settlement, together with all taxable costs and disbursements to which I would have been entitled if the case had been tried, and I agree to give him and hereby give him a lien on all the proceeds of said action for the same, and in addition thereto the taxable costs which may be awarded to me in such action; and further, I agree not to compound, compromise or settle my claim for such injuries or such action without his consent and except by him."

In answer to Speranza's petition filed herein, Walsh raised many objections to the enforcement of the lien, only one of

N. Y. Rep.] Opinion of the Court, per WERNER, J.

which we deem it necessary to consider. That objection is that the written instrument above quoted, and signed by Walsh alone, was champertous, illegal and in violation of the provisions of sections 73 and 74 of the Code of Civil Procedure. In support of this objection Walsh's answer alleges that he was induced to sign said instrument by a proposition in writing made by Speranza on January 25th, 1902, which reads as follows: "I will pay all court fees, fees of witnesses and necessary disbursements to judgment, if you will agree to give me forty (40) per cent of the damages recovered on the first \$10,000 thereof, and twenty-five (25) per cent of such damages on any greater sum than \$10,000 if settled before trial, twenty-five (25) per cent on the entire amount of the settlement plus the taxable costs to which I would be entitled if tried."

This allegation was met by a rebutting affidavit from Speranza in which he avers that he submitted to Walsh, at the latter's request, four distinct propositions as follows: "1. That said Walsh give deponent a retainer of \$250, and agree to pay 15% on any verdict that might be secured, or 10% on a settlement plus taxable costs. 2. That said Walsh advance all court fees and necessary disbursements, and 25% on any verdict that might be recovered, or 20% on a resettlement plus taxable costs. 3. That said Walsh advance one-half of all court fees and necessary disbursements as they become due, and 30% of any verdict that might be recovered, or 20% on a settlement plus taxable costs. 4. The proposition set forth in the agreement of February 8th, 1902, and embodied in the petition herein." These averments are followed by Speranza's assertion that Walsh, after due consideration, chose the last-mentioned proposition. Upon the petition and affidavits referred to, which, upon the issue of facts presented, are more in the nature of pleadings than proofs, the court, as stated, made an order fixing the attorney's lien and directing its enforcement.

What was the issue tendered by the answering affidavits of the appellant? Nothing more nor less than that the agree-

ment alleged by the respondent in support of his lien was champertous and void. That agreement as set forth by the respondent was, to be sure, perfectly free from champertous taint, and the appellant does not deny having signed it. If that were all, it would clearly justify the summary disposition of the proceeding made at Special Term. But the appellant says that the respondent has introduced only a part of the agreement and that there is another part, also in writing and signed by the respondent, which clearly reveals the champertous character of the whole. The court at Special Term seems to have proceeded upon the theory that the negotiations of the parties had all been merged in the writing signed by the appellant. In that connection it is to be noted that the part of the agreement relied upon by the appellant to establish champerty is not inconsistent with or contradictory of that part relied upon by the respondent. The agreement as set forth by the latter is silent as to the expenses of the litigation, and is signed only by the appellant. But if it is true that there is a written proposition signed by the attorney, by which he agrees to "pay all court fees, fees of witnesses and necessary disbursements to judgment," if the appellant would agree to the scale of compensation set forth in the other writing, it is too clear for discussion that the arrangement would constitute no less a palpable violation of the provisions of section 74 of the Code of Civil Procedure, than that which was so recently condemned in *Matter of Clark* (184 N. Y. 222).

We think the case is one in which the court at Special Term should have treated the record before it as presenting an issue upon which nothing short of a complete and thorough hearing, either in open court or before a referee, would satisfy the demands of justice. That is a practice not only sanctioned by long usage and the repeated approval of this court (*Matter of Fitzsimons*, 174 N. Y. 15; *Matter of King*, 168 id. 53; *Peri v. N. Y. C. & H. R. R. Co.*, 152 id. 521; *Matter of H—, an Attorney*, 87 N. Y. 521), but one peculiarly adapted to the ascertainment of the truth in cases where reckless affidavit making, or discreet silence upon essen-

N. Y. Rep.]

Statement of case.

tial particulars, may give the whole controversy a false atmosphere in which the real truth is hidden rather than revealed.

The orders of the Appellate Division and Special Term should be reversed, and the latter court directed to proceed as above indicated, with costs to abide the event.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ., concur.

Ordered accordingly.

WILLIAM E. D. STOKES, Appellant, v. CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Respondent.

1. STOCK CORPORATIONS—INCREASE IN CAPITAL STOCK THEREOF—RIGHT OF STOCKHOLDER TO SUBSCRIBE FOR HIS PROPORTIONATE SHARE OF NEW STOCK. A stockholder in a domestic corporation has an inherent right to a proportionate share of new stock issued for money only and not to purchase property for the purposes of the corporation or to effect a consolidation, and while he can waive that right, he cannot be deprived of it without his consent except when the stock is issued at a fixed price not less than par and he is given the right to take at that price in proportion to his holding, or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources.

2. SAME—WHEN STOCKHOLDER'S RIGHT TO TAKE NEW STOCK NOT WAIVED BY HIS DEMAND TO BUY IT AT PAR—WHEN HE MAY RECOVER DAMAGES UPON SALE OF HIS SHARE OF NEW STOCK TO THIRD PARTY—MEASURE OF DAMAGES. Where a stockholder in a domestic corporation consented to an increase of capital stock, but protested against the acceptance of a proposition to sell the new stock, when issued, to a third party at a fixed price, and demanded the right to subscribe and pay for his proportionate share of the new stock at par, which demand was refused by the corporation and a resolution thereafter adopted directing the sale of all the new stock, when issued, to a third party at a fixed price, which was less than the market value of such stock at the time it was issued and delivered, such stockholder, by demanding his proportionate share of the new stock at par, did not thereby waive his right to take it at the fixed price at which it was sold to the outside party, since the price was not fixed until after he had made his demand. After the price was fixed it was the duty of the directors of the corporation to give him an opportunity to purchase at that price before they could sell his

property to a third party, even with the approval of a large majority of the stockholders. The stock having been sold to a third party without any opportunity being given to the stockholder to take it at the fixed price, he can recover from the corporation the difference between the value of his stock at that price and the market value of the stock upon the day that it was delivered to the third party.

Stokes v. Continental Trust Co., 99 App. Div. 377, reversed.

(Argued May 11, 1906; decided November 18, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 4, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

This action was brought by a stockholder to compel his corporation to issue to him at par such a proportion of an increase made in its capital stock as the number of shares held by him before such increase bore to the number of all the shares originally issued, and in case such additional shares could not be delivered to him for his damages in the premises.

The defendant is a domestic banking corporation in the city of New York, organized in 1890, with a capital stock of \$500,000, consisting of 5,000 shares of the par value of \$100 each. The plaintiff was one of the original stockholders and still owns all the stock issued to him at the date of organization, together with enough more acquired since to make 221 shares in all. On the 29th of January, 1902, the defendant had a surplus of \$1,048,450.94, which made the book value of the stock at that time \$309.69 per share. On the 2nd of January, 1902, Blair & Company, a strong and influential firm of private bankers in the city of New York, made the following proposition to the defendant: "If your stockholders at the special meeting to be called for January 29th, 1902, vote to increase your capital stock from \$500,000 to \$1,000,000 you may deliver the additional stock to us as soon as issued at \$450 per share (\$100 par value) for ourselves and our associates, it being understood that we may nominate ten of the

N. Y. Rep.]

Statement of case.

21 trustees to be elected at the adjourned annual meeting of stockholders."

The directors of the defendant promptly met and duly authorized a special meeting of the stockholders to be called to meet on January 29th, 1902, for the purpose of voting upon the proposed increase of stock and the acceptance of the offer to purchase the same. Upon due notice a meeting of the stockholders was held accordingly, more than a majority attending either in person or by proxy. A resolution to increase the stock was adopted by the vote of 4,197 shares, all that were cast. Thereupon the plaintiff demanded from the defendant the right to subscribe for 221 shares of the new stock at par, and offered to pay immediately for the same, which demand was refused. A resolution directing a sale to Blair & Company at \$450 a share was then adopted by a vote of 3,596 shares to 241. The plaintiff voted for the first resolution but against the last, and before the adoption of the latter he protested against the proposed sale of his proportionate share of the stock and again demanded the right to subscribe and pay for the same, but the demand was refused.

On the 30th of January, 1902, the stock was increased, and on the same day was sold to Blair & Company at the price named. Although the plaintiff formally renewed his demand for 221 shares of the new stock at par and tendered payment therefor, it was refused upon the ground that the stock had already been issued to Blair & Company. Owing in part to the offer of Blair & Company, which had become known to the public, the market price of the stock had increased from \$450 a share in September, 1901, to \$550 in January, 1902, and at the time of the trial, in April, 1904, it was worth \$700 per share.

Prior to the special meeting of the stockholders, by authority of the board of directors a circular letter was sent to each stockholder, including the plaintiff, giving notice of the proposition made by Blair & Company and recommending that it be accepted. Thereupon the plaintiff notified the defendant that he wished to subscribe for his proportionate share of the

new stock, if issued, and at no time did he waive his right to subscribe for the same. Before the special meeting, he had not been definitely notified by the defendant that he could not receive his proportionate part of the increase, but was informed that his proposition would "be taken under consideration."

After finding these facts in substance, the trial court found, as conclusions of law, that the plaintiff had the right to subscribe for such proportion of the increase, as his holdings bore to all the stock before the increase was made; that the stockholders, directors and officers of the defendant had no power to deprive him of that right, and that he was entitled to recover the difference between the market value of 221 shares on the 30th of January, 1902, and the par value thereof, or the sum of \$99,450, together with interest from said date. The judgment entered accordingly was reversed by the Appellate Division, and the plaintiff appealed to this court, giving the usual stipulation for judgment absolute in case the order of reversal should be affirmed.

Ernest Hall, C. L. Harwood and Mortimer K. Flagg for appellant. Immediately upon the increase of the capital stock of the defendant corporation, the appellant, being then a stockholder, became *ipso facto* entitled, to the exclusion of any persons not stockholders, to subscribe for at par and to receive an amount of the new stock proportionate to his holdings prior to the increase. This right is inherent, pre-emptive and vested; and the sale of the entire issue of new stock to Blair & Co. should be viewed by a court of equity as an unwarranted confiscation thereof. (Cook on Corp. [5th ed.] § 286; Clark & Marshall on Corp. § 408; Angell & Ames on Corp. 430; Thompson on Corp. § 2094; Beach on Corp. § 473; Purdy's Beach on Corp. § 188; Morawetz on Corp. § 455; Dill on Corp. [3d ed.] 47; *Bank of Montgomery County v. Reese*, 26 Penn. St. 143; *Eidman v. Bowman*, 58 Ill. 444; *Cunningham's Appeal*, 108 Penn. St. 546; *Dousman v. W., etc., Co.*, 40 Wis. 418; *Jones v. Morrison*, 31 Minn. 140; *R. T. Co. v. Reading*, 137 Penn. St. 282; *Jones*

N. Y. Rep.]

Opinion of the Court, per VANN, J.

v. *Railroad Co.*, 67 N. H. 119; *Way v. A. G. Co.*, 60 N. J. Eq. 29, 263; *Morris v. Stevens*, 178 Penn. St. 563.) There is no rule of law or of public policy and no power in the officers or stockholders to compel an individual stockholder to pay more than par for his share of the new stock. (*Hammond v. Edison Co.*, 90 N. W. Rep. [Mich.] 1040; Cook on Corp. [5th ed.] § 286.)

William B. Hornblower, Robert W. De Forest and Robert Thorne for respondent. A corporation has a legal right, while acting in good faith, to issue new stock either to strangers or to its old stockholders, and at such fair price as it may fix. (*Miller v. I. C. R. R. Co.*, 24 Barb. 312.) The right to issue new stock was like a corporate franchise or any other property of the corporation which was held in trust by the corporation for the benefit of all its stockholders, to be administered by the stockholders or the directors for the best interests of all, and in such manner that no one or more of the stockholders should gain any unfair advantage or benefit therefrom, to the exclusion of or at the expense of any of the others. (*Reese v. Bank of Montgomery*, 31 Penn. St. 80; *Miller v. I. C. R. R. Co.*, 24 Barb. 312.)

VANN, J. No exception worthy of notice appears in the record, except those filed to the conclusions of law found by the trial judge. If those conclusions are supported by the facts found, the Appellate Division had no power to reverse the judgment rendered by the Special Term on questions of law only, as, from the silence of the record, it must be presumed was done. (Code Civ. Pro. § 1338.) If the facts found did not warrant the legal conclusions of the trial court the order of reversal was right and should be affirmed. Thus the question presented for decision is whether according to the facts found the plaintiff had the legal right to subscribe for and take the same number of shares of the new stock that he held of the old?

The subject is not regulated by statute and the question

presented has never been directly passed upon by this court, and only to a limited extent has it been considered by courts in this state. (*Miller v. Illinois Central R. R. Co.*, 24 Barb. 312; *Matter of Wheeler*, 2 Abb. Pr. [N. S.] 361; *Currie v. White*, 45 N. Y. 822.)

In the first case cited judgment was rendered by a divided vote of the General Term in the first district. The court held that the plaintiff was entitled to no relief because he did not own any shares when the new stock was issued but only an option, and that he could not claim to be an actual holder until he had exercised his right of election. The court further said, however, that if he was the owner of shares at the time of the new issue he had no absolute right as such owner to a distributive allotment of the new stock.

Matter of Wheeler was decided by Judge MASON at Special Term, and although the point was not directly involved, the learned judge said: "As I understand the law all these old stockholders had a right to share in the issuing of this new stock in proportion to the amount of stock held by them. And if none of the stock was to be apportioned to the old stockholders, they had certainly the right to have the new stock sold at public sale, and to the highest bidder, that they might share in the gains arising from the sale. In short, the old stockholders, as this was good stock and above par, had a property in the new stock, or a right at least to be secured the profits to be derived from a fair sale of it if they did not wish to purchase it themselves; and they have been deprived of this by the course which these directors have taken with this new stock by transferring or issuing it to themselves and others in a manner not authorized by law."

In *Currie v. White* the point was not directly involved, but Judge FOLGER, referring to the rights acquired under a certain contract, said: "One of these rights was to take new shares upon any legitimate increase of the capital stock, which right attaches to the old shares, not as profit or income, but as inherent in the shares in their very creation," citing *Atkins v. Alvree* (12 Allen, 359); *Brander v. Brander* (4 Ves. 800, and

notes, Sumner ed.). While this was said in a dissenting opinion, Judge RAPALLO, who spoke for the court, concurred, saying, "As to the claim for the additional stock, I concur in the conclusions of my learned brother FOLGER." The fair implication from both opinions is that if the plaintiff had preserved his rights, he would have been entitled to the new stock.

In other jurisdictions the decisions support the claim of the plaintiff with the exception of *Ohio Insurance Co. v. Nunne-macher* (15 Ind. 294) which turned on the language of the charter. The leading authority is *Gray v. Portland Bank*, decided in 1807 and reported in 3 Mass. 364. In that case a verdict was found for the plaintiff, subject, by the agreement of the parties, to the opinion of the court upon the evidence in the case whether the plaintiff was entitled to recover, and, if so, as to the measure of damages. The court held that stockholders who held old stock had a right to subscribe for and take new stock in proportion to their respective shares. As the corporation refused this right to the plaintiff he was permitted to recover the excess of the market value above the par value, with interest. In the course of its argument the court said: "A share in the stock or trust when only the least sum has been paid in is a share in the power of increasing it when the trustee determines or rather when the *cestui's* *que trustent* agree upon employing a greater sum. * * * A vote to increase the capital stock, if it was not the creation of a new and disjointed capital, was in its nature an agreement among the stockholders to enlarge their shares in the amount or in the number to the extent required to effect that increase. * * * If from the progress of the institution and the expense incurred in it any advance upon the additional shares might be obtained in the market, this advance upon the shares relinquished belonged to the whole, and was not to be disposed of at the will of a majority of the stockholders to the partial benefit of some and exclusion of others."

This decision has stood unquestioned for nearly a hundred years and has been followed generally by courts of the highest

standing. It is the foundation of the rule upon the subject that prevails, almost without exception, throughout the entire country.

In *Way v. American Grease Company* (60 N. J. Eq. 263, 269) the head note fairly expresses the decision as follows: "Directors of a corporation, which is fully organized and in the active conduct of its business, are bound to afford to existing stockholders an opportunity to subscribe for any new shares of its capital, in proportion to their holdings, before disposing of such new shares in any other way."

In *Eidman v. Bowman* (58 Ill. 444, 447) it was said: "When this corporation was organized, the charter and all of its franchises and privileges vested in the shareholders and the directors became their trustees for its management. The right to the remainder of the stock, when it should be issued, vested in the original stockholders, in proportion to the amount each held of the original stock, if they would pay for it, and was as fully theirs as was the stock already held and for which they had paid."

In *Dousman v. Wisconsin, etc., Co.* (40 Wis. 418, 421) it was held that a court of equity would compel a corporation to issue to every stockholder his proportion of new stock on the ground that "he has a right to maintain his proportionate interest in the corporation, certainly as long as there is sufficient stock remaining undisposed of by the corporation."

In *Jones v. Morrison* (31 Minn. 140, 152) it was said: "When the proposition that a corporation is trustee of the corporate property for the benefit of the stockholders in proportion to the stock held by them is admitted (and we find no well considered case which denies it), it covers as well the power to issue new stock as any other franchise or property which may be of value, held by the corporation. The value of that power, where it has actual value, is given to it by the property acquired and the business built up with the money paid by the subsisting stockholders. It happens not infrequently that corporations, instead of distributing their profits in the way of dividends to stockholders, accumulate them till

a large surplus is on hand. No one would deny that, in such case, each stockholder has an interest in the surplus which the courts will protect. No one would claim that the officers, directors or majority of the stockholders, without the consent of all, could give away the surplus, or devote it to any other than the general purposes of the corporation. But when new stock is issued, each share of it has an interest in the surplus equal to that pertaining to each share of the original stock. And if the corporation, either through the officers, directors or majority of stockholders, may dispose of the new stock to whomsoever it will, at whatever price it may fix, then it has the power to diminish the value of each share of old stock by letting in other parties to an equal interest in the surplus and in the good will or value of the established business."

In *Real Estate Trust Co. v. Bird* (90 Md. 229, 245) the court said: "There can be no doubt that the general rule is that when the capital stock of a corporation is increased by the issue of new shares, authorized by the charter, the holders of the original stock are entitled to the new stock in the proportion that the number of shares held by them bears to the whole number before the increase."

In all these cases, as well as many others, *Gray v. Portland Bank* (*supra*) is followed without criticism or question. In some cases the same result is reached without citing that case. Thus in *Jones v. Concord & Montreal R. R. Co.* (67 N. H. 119) it was declared, as stated in the head note, that "an issue of new shares of stock in an increase of the capital of a corporation is a partial division of the common property, which can be taken from the original shareholders only by their consent or by legal process."

So in *Bank of Montgomery v. Reese* (26 Pa. St. 143, 146; 31 id. 78) the court said: "Morgan L. Reese as one of the stockholders of the Bank of Montgomery, was entitled to a portion of the unsold capital stock. His right was as valid as that of a tenant in common of real estate to his purpart on a partition. The corporation was a trustee for the stockholders, but in disregard of the duties of the trust in distributing this

stock it deprived Mr. Reese of the number of shares to which he was entitled. He has established his right in this action." The question of power was broadly presented and decided.

In another case in the same state, *Morris v. Stevens* (178 Pa. St. 563, 578), Mr. Chief Justice STERRETT used the following language: "In general, the present holders of stock have a primary right to subscribe in proportion to their holdings for any new issue. The stockholders themselves certainly may determine otherwise and order a sale to the public and payment of the proceeds into the treasury. But this is exceptional and the exercise of a reserved power which should not be permitted unless there is a clear intent of the stockholders to do so." (See, also, *Cunningham's Appeal*, 108 Pa. St. 546; *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282; *De La Cuesta v. Ins. Co.*, 136 Pa. St. 62; *Humboldt Driving Park Assoc. v. Stevens*, 34 Neb. 528, 534; *Hart v. St. Charles Street R. R. Co.*, 30 La. Ann. 758; *State v. Smith*, 48 Vt. 290; *Atkins v. Albree*, 94 Mass. 359; *Hammond v. Edison Illuminating Co.*, 131 Mich. 79; *Knapp v. Publishers George Knapp & Co.*, 127 Mo. 53; *Baltimore City Pass. R. Co. v. Hambleton*, 77 Md. 341; *Jones v. C. & M. R. R. Co.*, 67 N. H. 119; *Id.* 234.)

The elementary writers are very clear and emphatic in laying down the same rule. Thus in 2 Beach on Private Corporations (§ 473) the learned author says: "A stockholder of the old stock, at the time of the vote to augment the capital of a company, has a right in the new stock, in proportion to the amount of his interest in the old, of which he cannot be rightfully deprived by other stockholders."

"When the capital stock of a corporation is increased by the issue of new shares each holder of the original stock has a right to offer to subscribe for and to demand from the corporation such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase. This pre-emptive right of the shareholders in respect to new stock is well recognized.

N. Y. Rep.]

Opinion of the Court, per VANN, J.

* * * The corporation cannot compel the old stockholders upon their subscription for new stock to pay more than par value therefor. They are entitled to it without extra burden or price beyond the regular par value. An attempt to deprive the stockholder of this right will be enjoined in the absence of laches or acquiescence. The courts go very far in protecting the right of stockholders to subscribe for new stock. It is often a very important right." (1 Cook on Corporations [4th ed.], 286.)

"Each shareholder, it has been held, has a right to the opportunity to subscribe for and take the new or increased stock in proportion to the old stock held by him; so that a vote at a shareholders' meeting, directing the new stock to be sold, without giving to each shareholder such an opportunity, is void as to any dissenting shareholder." (10 Cyc. 543.)

"Those who are shareholders when an increase of capital stock is effected enjoy the right to subscribe to the new stock in proportion to their original holdings and before subscriptions may be received from outsiders." (26 Am. & Eng. Encyc. [2nd ed.] 947. See, also, 2 Thompson's Commentaries, § 2094; Angell & Ames on Corporations, 430; Morawetz on Corporations, § 455.)

If the right claimed by the plaintiff was a right of property belonging to him as a stockholder he could not be deprived of it by the joint action of the other stockholders and of all the directors and officers of the corporation.]

What is the nature of the right acquired by a stockholder through the ownership of shares of stock? What rights can he assert against the will of a majority of the stockholders and all the officers and directors? While he does not own and cannot dispose of any specific property of the corporation, yet he and his associates own the corporation itself, its charter, franchises and all rights conferred thereby, including the right to increase the stock. He has an inherent right to his proportionate share of any dividend declared, or of any surplus arising upon dissolution, and he can prevent waste or misappropriation of the property of the corporation by those

in control. Finally, he has the right to vote for directors and upon all propositions subject by law to the control of the stockholders, and this is his supreme right and main protection. Stockholders have no direct voice in transacting the corporate business, but through their right to vote they can select those to whom the law intrusts the power of management and control.

A corporation is somewhat like a partnership, if one were possible, conducted wholly by agents where the copartners have power to appoint the agents, but are not responsible for their acts. The power to manage its affairs resides in the directors, who are its agents, but the power to elect directors resides in the stockholders. This right to vote for directors and upon propositions to increase the stock or mortgage the assets, is about all the power the stockholder has. So long as the management is honest, within the corporate powers and involves no waste, the stockholders cannot interfere, even if the administration is feeble and unsatisfactory, but must correct such evils through their power to elect other directors. Hence, the power of the individual stockholder to vote in proportion to the number of his shares, is vital and cannot be cut off or curtailed by the action of all the other stockholders even with the co-operation of the directors and officers.

In the case before us the new stock came into existence through the exercise of a right belonging wholly to the stockholders. As the right to increase the stock belonged to them, the stock when increased belonged to them also, as it was issued for money and not for property or for some purpose other than the sale thereof for money. By the increase of stock the voting power of the plaintiff was reduced one-half, and while he consented to the increase he did not consent to the disposition of the new stock by a sale thereof to Blair & Company at less than its market value, nor by sale to any person in any way except by an allotment to the stockholders. The increase and sale involved the transfer of rights belonging to the stockholders as part of their investment. The issue of new stock and the sale thereof to Blair & Company

N. Y. Rep.]

Opinion of the Court, per VANN, J.

- was not only a transfer to them of one-half the voting power of the old stockholders, but also of an equitable right to one-half the surplus which belonged to them. In other words, it was a partial division of the property of the old stockholders. The right to increase stock is not an asset of the corporation any more than the original stock when it was issued pursuant to subscription. The ownership of stock is in the nature of an inherent but indirect power to control the corporation. The stock when issued ready for delivery does not belong to the corporation in the way that it holds its real and personal property, with power to sell the same, but is held by it with no power of alienation in trust for the stockholders, who are the beneficial owners and become the legal owners upon paying therefor. The corporation has no rights hostile to those of the stockholders, but is the trustee for all including the minority. The new stock issued by the defendant under the permission of the statute did not belong to it, but was held by it the same as the original stock when first issued was held in trust for the stockholders. It has the same voting power as the old, share for share. The stockholders decided to enlarge their holdings, not by increasing the amount of each share, but by increasing the number of shares. The new stock belonged to the stockholders as an inherent right by virtue of their being stockholders, to be shared in proportion upon paying its par value or the value per share fixed by vote of a majority of the stockholders, or ascertained by a sale at public auction. While the corporation could not compel the plaintiff to take new shares at any price, since they were issued for money and not for property, it could not lawfully dispose of those shares without giving him a chance to get his proportion at the same price that outsiders got theirs. He had an inchoate right to one share of the new stock for each share owned by him of the old stock, provided he was ready to pay the price fixed by the stockholders. If so situated that he could not take it himself, he was entitled to sell the right to one who could, as is frequently done. Even this gives an advantage to capital,

but capital necessarily has some advantage. Of course, there is a distinction when the new stock is issued in payment for property, but that is not this case. The stock in question was issued to be sold for money and was sold for money only. A majority of the stockholders, as part of their power to increase the stock, may attach reasonable conditions to the disposition thereof, such as the requirement that every old stockholder electing to take new stock shall pay a fixed price therefor, not less than par, however, owing to the limitation of the statute. They may also provide for a sale in parcels or bulk at public auction, when every stockholder can bid the same as strangers. They cannot, however, dispose of it to strangers against the protest of any stockholder who insists that he has a right to his proportion. Otherwise the majority could deprive the minority of their proportionate power in the election of directors and of their proportionate right to share in the surplus, each of which is an inherent, preemptive and vested right of property. It is inviolable and can neither be taken away nor lessened without consent, or a waiver implying consent. The plaintiff had power, before the increase of stock, to vote on 221 shares of stock, out of a total of 5,000, at any meeting held by the stockholders for any purpose. By the action of the majority, taken against his will and protest, he now has only one-half the voting power that he had before, because the number of shares has been doubled while he still owns but 221. This touches him as a stockholder in such a way as to deprive him of a right of property. Blair & Company acquired virtual control, while he and the other stockholders lost it. We are not discussing equities, but legal rights, for this is an action at law, and the plaintiff was deprived of a strictly legal right. If the result gives him an advantage over other stockholders, it is because he stood upon his legal rights, while they did not. The question is what were his legal rights, not what his profit may be under the sale to Blair & Company, but what it might have been if the new stock had been issued to him in proportion [to his holding of the old. The other stockholders could give

their property to Blair & Company, but they could not give his.

A share of stock is a share in the power to increase the stock, and belongs to the stockholders the same as the stock itself. When that power is exercised, the new stock belongs to the old stockholders in proportion to their holding of old stock, subject to compliance with the lawful terms upon which it is issued. When the new stock is issued in payment for property purchased by the corporation, the stockholders' right is merged in the purchase, and they have an advantage in the increase of the property of the corporation in proportion to the increase of stock. When the new stock is issued for money, while the stockholders may provide that it be sold at auction or fix the price at which it is to be sold, each stockholder is entitled to his proportion of the proceeds of the sale at auction, after he has had a right to bid at the sale, or to his proportion of the new stock at the price fixed by the stockholders.

We are thus led to lay down the rule that a stockholder has an inherent right to a proportionate share of new stock issued for money only and not to purchase property for the purposes of the corporation or to effect a consolidation, and while he can waive that right, he cannot be deprived of it without his consent except when the stock is issued at a fixed price not less than par and he is given the right to take at that price in proportion to his holding, or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources. This rule is just to all and tends to prevent the tyranny of majorities which needs restraint, as well as virtual attempts to blackmail by small minorities which should be prevented.

The remaining question is whether the plaintiff waived his rights by failing to do what he ought to have done, or by doing something he ought not to have done. He demanded his share of the new stock at par, instead of at the price fixed by the stockholders, for the authorization to sell at \$450 a share was virtually fixing the price of the stock. He did

more than this, however, for he not only voted against the proposition to sell to Blair & Company at \$450, but as the court expressly found, he "protested against the proposed sale of his proportionate share of the stock and again demanded the right to subscribe and pay for the same which demands were again refused," and "the resolution was carried notwithstanding such protest and demands." Thus he protested against the sale of his share before the price was fixed, for the same resolution fixed the price and directed the sale, which was promptly carried into effect. If he had not attended the meeting, called upon due notice to do precisely what was done, perhaps he would have waived his rights, but he attended the meeting and before the price was fixed demanded the right to subscribe for 221 shares at par and offered to pay for the same immediately. It is true that after the price was fixed he did not offer to take his share at that price, but he did not acquiesce in the sale of his proportion to Blair & Company, and unless he acquiesced the sale as to him was without right. He was under no obligation to put the corporation in default by making a demand. The ordinary doctrine of demand, tender and refusal has no application to this case. The plaintiff had made no contract. He had not promised to do anything. No duty of performance rested upon him. He had an absolute right to the new stock in proportion to his holding of the old and he gave notice that he wanted it. It was his property and could not be disposed of without his consent. He did not consent. He protested in due time, and the sale was made in defiance of his protest. While in connection with his protest he demanded the right to subscribe at par, that demand was entirely proper when made, because the price had not then been fixed. After the price was fixed it was the duty of the defendant to offer him his proportion at that price, for it had notice that he had not acquiesced in the proposed sale of his share, but wanted it himself. The directors were under the legal obligation to give him an opportunity to purchase at the price fixed before they could sell his property to a third

N. Y. Rep.]

Dissenting opinion, per HAIGHT, J.

party, even with the approval of a large majority of the stockholders. If he had remained silent and had made no request or protest he would have waived his rights, but after he had given notice that he wanted his part and had protested against the sale thereof, the defendant was bound to offer it to him at the price fixed by the stockholders. By selling to strangers without thus offering to sell to him, the defendant wrongfully deprived him of his property and is liable for such damages as he actually sustained.

The learned trial court, however, did not measure the damages according to law. The plaintiff was not entitled to the difference between the par value of the new stock and the market value thereof, for the stockholders had the right to fix the price at which the stock should be sold. They fixed the price at \$450 a share, and for the failure of the defendant to offer the plaintiff his share at that price we hold it liable in damages. His actual loss, therefore, is \$100 per share, or the difference between \$450, the price that he would have been obliged to pay had he been permitted to purchase, and the market value on the day of sale, which was \$550. This conclusion requires a reversal of the judgment rendered by the Appellate Division and a modification of that rendered by the trial court.

The order appealed from should be reversed and the judgment of the trial court modified by reducing the damages from the sum of \$99,450, with interest from January 30th, 1902, to the sum of \$22,100, with interest from that date, and by striking out the extra allowance of costs, and as thus modified the judgment of the trial court is affirmed, without costs in this court or in the Appellate Division to either party.

HAIGHT, J. (dissenting). I agree that the rule that we should adopt is that a stockholder in a corporation has an inherent right to purchase a proportionate share of new stock issued for money only, and not to purchase property necessary for the purposes of the corporation or to effect a consolidation. While he can waive that right he cannot be deprived

of it without his consent, except by sale at a fixed price at or above par, in which he may buy at that price in proportion to his holding or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources. I, however, differ with Judge VANN as to his conclusions as to the rights of the plaintiff herein. Under the findings of the trial court the plaintiff demanded that his share of the new stock should be issued to him at par, or \$100 per share, instead of \$450 per share, the price offered by Blair & Company and the price fixed at the stockholders' meeting at which the new stock was authorized to be sold. This demand was made after the passage of the resolution authorizing the increase of the capital stock of the defendant company and before the passage of the resolution authorizing a sale of the new stock to Blair & Company at the price specified. After the passage of the second resolution he objected to the sale of his proportionate share of the new stock to Blair & Company and again demanded that it be issued to him, and the following day he made a legal tender for the amount of his portion of the new stock at \$100 per share. There is no finding of fact or evidence in the record showing that he was ever ready or willing to pay \$450 per share for the stock. He knew that Blair & Company represented Marshall Field and others at Chicago, great dry goods merchants, and that they had made a written offer to purchase the new stock of the company provided the stockholders would authorize an increase of its capital stock from five hundred thousand to a million dollars. He knew that the trustees of the company had called a special meeting of the stockholders for the purpose of considering the offer so made by Blair & Company. He knew that the increased capitalization proposed was for the purpose of enlarging the business of the company and bringing into its management the gentlemen referred to. There is no pretense that any of the stockholders would have voted for an increase of the capital stock otherwise than for the purpose of accepting the offer of Blair & Company. All were evidently desirous of interesting the gentle-

N. Y. Rep.]

Dissenting opinion, per HAIGHT, J.

men referred to in the company, and by securing their business and deposits increase the earnings of the company. This the trustees carefully considered, and in their notice calling the special meeting of the stockholders distinctly recommended the acceptance of the offer. What, then, was the legal effect of the plaintiff's demand and tender? To my mind it was simply an attempt to make something out of his associates, to get for \$100 per share the stock which Blair & Company had offered to purchase for \$450 per share; and that it was the equivalent of a refusal to pay \$450 per share, and its effect is to waive his right to procure the stock by paying that amount. An acceptance of his offer would have been most unjust to the remaining stockholders. It would not only have deprived them of the additional sum of \$350 per share, which had been offered for the stock, but it would have defeated the object and purpose for which the meeting was called, for it was well understood that Blair & Company would not accept less than the whole issue of the new stock. But this is not all. It appears that prior to the offer of Blair & Company the stock of the company had never been sold above \$450 per share; that thereafter the stock rapidly advanced until the day of the completion of the sale on the 30th of January, when its market value was \$550 per share; but this, under the stipulation of facts, was caused by the rumor and subsequent announcement and consummation of the proposition for the increase of the stock and the sale of such increase to Blair & Company and their associates. It is now proposed to give the plaintiff as damages such increase in the market value of the stock, even though such value was based upon the understanding that Blair & Company were to become stockholders in the corporation, which the acceptance of plaintiff's offer would have prevented. This, to my mind, should not be done. I, therefore, favor an affirmance.

CULLEN, Ch. J., WERNER and HISCOCK, JJ., concur with VANN, J.; WILLARD BARTLETT, J., concurs with HAIGHT, J.; O'BRIEN, J., absent.

Ordered accordingly.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Respondent, v. THE HARLEM BRIDGE, MOR-
RISANIA AND FORDHAM RAILWAY COMPANY, Appellant.

1. STREET SURFACE RAILROADS—PROVISION OF STATUTE, INCORPORATING STREET SURFACE RAILROAD COMPANY, TO KEEP PAVEMENT BETWEEN ITS TRACKS IN GOOD REPAIR—WHEN APPLICABLE TO EXTENSION OF RAILROAD CONSTRUCTED UNDER SUBSEQUENT STATUTE. Where a street surface railroad company was incorporated to build and operate a street surface railroad in and upon streets now within the city of New York under a special statute (L. 1868, ch. 361), to which was added, by a subsequent amendment (L. 1871, ch. 658), a provision requiring the company and its successors to "keep the surface of the street inside its rails and for one foot outside thereof in good and proper order and repair," and the company extended its lines over roads and streets, not named in its charter, under the authority of a subsequent act (L. 1874, ch. 558), amending the original act of incorporation, the company is compelled, upon the requirement of the authorities of the city, to lay a new granite block pavement between and for one foot outside the rails of its tracks to conform with a new granite pavement laid by the city in the streets in which the extended lines are situated, although the statute authorizing the extension is silent upon the subject of repairs or repaving, since the authority to construct such extension was subject to the obligations contained in the original act of incorporation as amended.

2. SAME—OBLIGATION OF STREET SURFACE RAILROAD COMPANY TO LAY NEW PAVEMENT BETWEEN ITS TRACKS AT DEMAND OF MUNICIPALITY. Where the statute under which a street surface railroad company was incorporated contains a provision requiring the company to "keep the surface of the street inside the rails and for one foot outside thereof in good and proper order and repair," the question of what shall constitute keeping the pavement in good order and repair should be determined, somewhat at least, with reference to existing and surrounding conditions; and where a municipality has for sufficient reason decided to pave a street with a new and better pavement, it is the duty of the railroad company to co-operate with the city and put its part of the street in the same condition as the remainder thereof, even though that necessitates the laying of a new pavement as distinguished from repairing an old one.

Mayor, etc., of New York v. H. B., M. & F. Ry. Co., 100 App. Div. 257, affirmed.

(Argued October 8, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered Janu-

ary 17, 1905, reversing a judgment in favor of defendant entered upon a verdict directed by the court and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles F. Brown, Joseph P. Cotton, Jr., and Henry A. Robinson for appellant. The only obligation relating to the care of the streets which rests upon the appellant is that contained in the amended section 3 of the act of 1871 providing that the said grantees or their successors "shall keep the surface of the street inside the rails and for one foot outside thereof in good and proper order and repair." The words "keep in good and proper order and repair" do not include any obligation to pave, particularly not such paving as amounts to a reconstruction of the street surface. (*Cushing v. Worrick*, 9 Gray, 382; *Mayor, etc., v. E. A. R. R. Co.*, 7 App. Div. 84; *Mayor, etc., v. R. R. Co.*, 46 N. Y. S. R. 349; *Weed v. Common Council*, 26 Misc. Rep. 288; *Matter of Fulton St.*, 29 How. Pr. 429; *Gilmore v. City of Utica*, 121 N. Y. 561; *City of Binghamton v. Ry. Co.*, 61 Hun, 485; *Binniger v. City of New York*, 177 N. Y. 199; *City of Chicago v. Sheldon*, 9 Wall. 50; *State v. Mayor, etc.*, 50 Atl. Rep. 620.)

John J. Delany, Corporation Counsel (Theodore Connolly and Terence Farley of counsel), for respondent. Section 3 of chapter 658 of the Laws of 1871 did not repeal chapter 815 of the Laws of 1866. (*Hankins v. Mayor, etc.*, 64 N. Y. 18.) The defendant is not only under an obligation to keep the space inside its rails and for one foot outside thereof in good and proper order and repair, but it is also compelled to contribute to the expense of a new pavement. (*Binghamton v. B. & P. D. R. R. Co.*, 61 Hun, 479; *Conway v. City of Rochester*, 157 N. Y. 33; *City of Rochester v. R. R. Co.*, 182 N. Y. 99; *Doyle v. City of New York*, 58 App. Div. 588; *Village of Mechanicville v. S. & M. S. R. Co.*, 35

Misc. Rep. 513; 174 N. Y. 507; *District of Columbia v. W. & G. R. R. Co.*, 1 Mackey [D. C.], 361; *District of Columbia v. Metro. R. R. Co.*, 4 Mackey [D. C.], 214; 8 App. Cas. [D. C.] 322; *State of Florida ex rel. v. J. S. R. R.*, 29 Fla. 590; *Atlanta v. G. C. S. R. R. Co.*, 80 Ga. 276.)

HISCOCK, J. This action was brought to recover the value of granite block pavement laid between and for one foot outside the rails of defendant's tracks in 138th street, New York, at the same time that the rest of said street was being paved with said material, the defendant having failed to so pave its tracks in accordance with the demand of the plaintiff.

The learned Appellate Division, in reversing the determination of the trial court, held that the defendant was under obligation to lay a trap rock pavement in the place specified by virtue of a condition contained in the permit granted by the municipal authorities to lay its tracks in said street, and that by virtue of such liability the plaintiff was entitled to recover upon the entire cost of laying the granite block pavement what it would have cost the defendant to lay a trap rock pavement.

We agree with the Appellate Division that it was error to direct a verdict in favor of the defendant and that a new trial was properly granted, but upon somewhat different grounds than were adopted by that learned court.

The defendant was incorporated under chapter 361 of the Laws of 1863. Chapter 553 of the Laws of 1874, by amendment to section 8 of the original act of incorporation, authorized the defendant to lay its tracks in the street in question.

Chapter 658 of the Laws of 1871 amended section 3 of the original statute of incorporation so as to read as follows:

"§ 3. * * * the said grantees or their successors shall keep the surface of the street inside the rails and for one foot outside thereof, in good and proper order and repair, and conform the tracks to the grades of the streets or avenues as they now are or may hereafter be changed by the authorities of the aforesaid towns."

The amendatory statute permitting it to construct its tracks in the street in question contained no provision upon the subject of repairs or repaving, from which it is argued that the defendant is exempt as to such extension from the obligations contained in the provisions of the original act, as amended, upon that subject. We do not, however, agree with this contention, but think it very clear that when defendant was authorized to construct the extension in question by an amendment of a section of the original act such extension was subject to the obligations contained in such original act as amended.

In 1888-9 the municipal authorities of New York took proper proceedings and entered into a contract for paving the street where defendant's tracks lay with granite block pavement. Prior to that time there had been no complete or actual pavement of the street in any manner, but the same was substantially a dirt road. In some places a species of incomplete macadam had been laid, but only to the extent of filling up uneven spots in the road, and at the time in question the evidence shows quite conclusively that the street, and especially between the tracks of defendant's road, was soft and uneven and not in good repair or in good order.

The municipality served upon defendant a proper notice requiring it to pave, basing such notice and its complaint herein upon the obligations contained in section 3 of the statute incorporating it, as amended by the act of 1871, heretofore referred to, and the specific question, therefore, presented is whether the obligation resting upon the defendant to keep the space inside and outside its rails "in good and proper order and repair," etc., compelled it, under the circumstances, upon the requirement of the city, to lay a granite block pavement, and this question we have concluded to answer in the affirmative.

While it may be admitted that the decisions and authorities are not uniform, either within this state or outside of it, upon the question whether such an obligation requires a railroad company to lay a new pavement, as distinguished from merely

repairing an old one, we think that the controlling ones in this state decide such proposition in the affirmative.

In *Conway v. City of Rochester* (157 N. Y. 33) the question was directly involved whether the Rochester Railway Company could be compelled to repave its tracks with asphalt in connection with the repaving of the remainder of the street with that material under the direction of the municipal authorities, there previously having been there a macadam or entirely different kind of pavement. The obligation so to do in that case rested, if at all, upon the provisions of section 98 of the Railroad Law (Laws 1890, chap. 565, as amended) imposing upon every street surface railroad company operating its tracks in a city or village street to "have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe." It was held that this obligation, under the circumstances stated, did require the railroad company to repave with an entirely new material. The court say (page 39): "The local authorities may determine when and how the street shall be repaired, but when that is done the statute steps in and says the railroad company is to do the work. * * * Our examination of the statute then leads to the conclusion that under section 98 of the Railroad Act it became and was the duty of the Rochester Railway Company to keep in permanent repair such portion of the street through which it passed as was within its tracks, and two feet in width outside, and that the local authorities of that city were vested with the authority of determining when the repairs should be made, and thus empowered, the local authorities did determine that repairs should be made and the character of them. They decided that the entire street should be repaved and that the material to be used should be asphalt. This they had the right to do, and when this determination was made the statute intervened and commanded that the Rochester Railway Company should make

the repairs thus ordered under the supervision of the local authorities."

We regard the obligations imposed upon the defendant in this case quite as broad as those which were outlined in the statute last referred to. In the place of a requirement "to have and keep in permanent repair * * * under the supervision of the proper local authorities, and whenever required by them to do so," we have the provision compelling the defendant here to keep "in good and proper order and repair and conform the tracks," etc. While this statute does not itself specify, as in the case of the Railroad Law, that this shall be done under the supervision of the municipal authorities and in accordance with their specifications, that necessarily follows from the general duties and powers conferred upon such authorities by law. Therefore, when the proper authorities, in view of the condition of the street as shown to exist, decided that a granite block pavement should be laid, we think that the requirement for repairing and keeping in good order compelled the defendant to co-operate with the city and put the space between its rails in the same condition as the rest of the street, even though that necessitated the laying of a new pavement.

It has been held elsewhere by this court that an obligation, couched in substantially similar language resting upon a railroad company, will compel it under proper conditions to lay a new kind of pavement. In *Village of Mechanicville v. Stillwater & M. St. Ry. Co.* (35 Misc. Rep. 513; affirmed, 174 N. Y. 507) it was held that a provision in defendant's franchise containing a requirement that the space between the rails, etc., should be paved by the railroad company with "small stone" and "that the same should at all times be kept in good condition," authorized the village to compel the railroad company to repave with vitrified paving brick, and in *Binnering v. City of New York* (177 N. Y. 199, 212-214) the discussion extended to the subject of laying new pavements as distinguished from merely repairing old ones under obligations such as we have been discussing, and the views in such discus-

sion expressed by the majority of the court confirm the decisions already cited.

We, therefore, regard it as settled by controlling authority in this state that the plaintiff was entitled to require of the defendant to lay in its tracks granite pavement, and we find no difficulty in following such adjudication. The question of what shall constitute keeping a pavement in the tracks of a railroad company in good order and repair is to be determined somewhat at least by reference to existing and surrounding conditions, and in our judgment it would be altogether too narrow a view to hold that where a municipality had for sufficient reason decided to pave a street with asphalt or other new pavement a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a dirt road or some species of pavement which had become antiquated and out of condition and which was entirely different from that adopted in the remainder of the street.

These views render it unnecessary for us to consider or accept the somewhat narrower view of a special contract upon which the Appellate Division placed its decision of reversal.

The order should be affirmed and judgment absolute ordered against defendant on the stipulation, with costs in all courts.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur; GRAY, J., absent.

Order affirmed, etc.

RUTH CRANCH, Respondent, v. THE BROOKLYN HEIGHTS
RAILROAD COMPANY, Appellant.

CONTRIBUTORY NEGLIGENCE. The facts examined in an action to recover damages for injuries sustained by the plaintiff while attempting to cross the railroad track of defendant, and held that they not only failed to establish her freedom from contributory negligence, but demonstrated its existence as a matter of law.

Cranch v. Brooklyn Heights R. R. Co., 107 App. Div. 341, reversed.

(Argued October 17, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 6, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

This action was brought to recover damages for injuries sustained by the plaintiff in a collision with one of defendant's trains at what is known as the 84th street station of that branch of its railroad which runs southerly from the city of Brooklyn to Ulmer Park. The 84th street station is in the Bath Beach section of the city of Brooklyn. The accident happened shortly before 11 o'clock on the morning of November 22, 1901. The plaintiff, a married woman, was on that date about 41 years of age, and, with her husband, had resided within a few blocks of the station mentioned for a number of years, so that she was familiar with the locality and with the times of the running of trains on defendant's road.

At 84th street the railroad consists of double tracks running generally north and south. The trains are propelled from an overhead trolley system. At that point the right of way is a private one derived from a steam railroad which had formerly been operated there. On each side of the tracks to the south of 84th street, which crosses the tracks from east to west, are concrete platforms 120 feet in length that serve as stations for persons intending to take passage on defendant's trains. The north-bound trains run to Brooklyn and pass in front of the easterly platform, while the south-bound trains going to Ulmer Park pass in front of the westerly platform.

At about 20 minutes to 11 on the morning of the accident the plaintiff, in company with her husband, left her home intending to take a train to Brooklyn which was scheduled to leave 84th street at 10:53. They approached the tracks from the west by a diagonal foot path across a vacant lot. When they had crossed this vacant lot and had reached 18th avenue, which is adjacent to the defendant's right of way on the west, they saw a train approaching from the south and then about 700 or 800 feet distant. They supposed that it was the 10:53

train to Brooklyn which they intended to take. Continuing towards the tracks and expecting to cross them to the opposite platform ahead of the approaching train their progress was interrupted by a train from Brooklyn which came in on the south-bound track in front of them, crossed 84th street and stopped at the platform on the westerly side. The rear end of the last car of this south-bound train stopped at about the northerly end of the platform on the westerly side, which is about 6 feet south of the 84th street crossing. As they crossed behind the rear car of this train and emerged from behind it into the space between the two tracks, the plaintiff looked to the south and saw the on-coming north-bound train at the southerly end of the concrete platform about 120 feet away. Her husband crossed safely at this point and reached the northerly end of the platform on the opposite side, which is nearer to 84th street than the one on the westerly side. The plaintiff did not attempt to follow her husband across at this point. Having seen the train approaching at the other end of the platform, and evidently supposing that it would stop by the time the first car reached the northerly end of the platform, she turned and walked towards the north about 35 feet, taking the same direction as the approaching train. This took her well into the center of 84th street. She then attempted to cross without again looking at the approaching train. Just as she placed one foot on the track she was struck by the motor car of the north-bound train, which had not slackened its speed, and sustained the injuries complained of.

The plaintiff and her husband acted upon the assumption that this train was the one due to leave for Brooklyn at 10:53, and that it would stop as usual in front of the 84th street platform in such a position that the first car would not pass beyond the northerly end of the platform. It transpired, however, that it was not a regular train, and was not scheduled to stop at that station. The place at which the plaintiff attempted to cross was shown, by the plaintiff's evidence, to be considerably to the north of the usual stopping place of trains at this station.

The plaintiff's evidence tended to show, and the jury were justified in finding, that all trains, except those running at night after 9 or 10 o'clock and in the early morning, came to a stop at this station, and that the front end of the first car of such stopping trains did not usually project more than a few feet beyond the end of the platform towards the 84th street crossing.

The evidence also justified the jury in finding that in approaching this station those in charge of the train that caused the accident blew no whistle, rang no bell or gave any warning of its approach, and that the speed of the train, which was about 12 miles an hour, was not slackened. In short, that nothing was done to indicate that this was not the regular train scheduled to stop at the 84th street station at that time.

I. R. Oeland and George D. Yeomans for appellant. Plaintiff failed to show her freedom from contributory negligence, and the action should have been dismissed. (*White v. N. Y. C. R. R. Co.*, 68 App. Div. 564; *Salter v. U. & B. R. R. Co.*, 75 N. Y. 281; *Lofsten v. B. H. R. R. Co.*, 184 N. Y. 148; *Knapp v. M. S. Ry. Co.*, 103 App. Div. 252; *Keller v. E. R. R. Co.*, 98 App. Div. 552; *Ryan v. N. Y. C. & H. R. R. Co.*, 30 App. Div. 154; *Madden v. N. Y. C. & H. R. R. Co.*, 47 N. Y. 665; *Davenport v. B. C. R. R. Co.*, 100 N. Y. 632; *Freeman v. B. H. R. R. Co.*, 82 App. Div. 522; *Johnson v. T. A. R. R. Co.*, 69 App. Div. 250.)

Stephen C. Baldwin for respondent. Whether plaintiff was guilty of negligence contributing to the injury was a question of fact for the jury. (*Smith v. N. Y. C. & H. R. R. Co.*, 177 N. Y. 224.)

WERNER, J. For the purposes of this discussion we will assume that the jury had the right to charge the defendant with negligence, for there was evidence tending to show that

those in charge of the train with which the plaintiff collided gave no signal or warning of its approach to the crossing at which the accident happened. We must also assume that the evidence warranted the finding that all of the north-bound trains of the defendant stopped at the 84th street station, and that this fact was known to the plaintiff, who had been a resident in that vicinity for many years, and had been a frequent passenger on the defendant's railroad. If these facts, in and of themselves, justified the plaintiff's attempt to cross the tracks at the time and in the manner above indicated, it would logically follow that the verdict of the jury was proper and that its affirmance by the Appellate Division was necessary. It seems to us, however, that the plaintiff's evidence upon this feature of the case not only failed to establish her freedom from contributory negligence, but demonstrated its existence as matter of law. The evidence which tended to show that all of the defendant's north-bound trains stopped at the 84th street station was clearly competent and cogent upon that question, and, standing alone, might have been sufficient to sustain the conclusion that the plaintiff was free from contributory negligence. But there is something more. The plaintiff testified that from the time when she and her husband reached 18th avenue and first saw the north-bound train at a distance of 700 or 800 feet south of the station, she did not see it again until she looked around the rear end of the south-bound train which had stopped at the station. At that moment she saw the north-bound train coming into the southerly end of the station at a distance of at least 120 feet south of the point from which she took her observation. Instead of attempting to cross then and there, as she might possibly have done in safety, she concluded to walk to the north for a distance of 35 or 40 feet, to a place at or near the center of 84th street. What was her purpose in doing this? She was doubtless acting upon the assumption that the train would stop at the station, and, therefore, concluded to go far enough to the north to be entirely clear of the motor car of the train which, in stopping, might run slightly past the limits

N. Y. Rep.] Opinion of the Court, per WERNER, J.

of the station and into the boundaries of 84th street. Having taken this precaution, while she was in a place of absolute safety from which she could at every instant have commanded a full view of the approaching train, it is obvious that she should not have attempted to cross the track without first looking to see whether the train had in fact stopped. It is a familiar physical fact within the knowledge of all persons of ordinary intelligence that railroad trains, operated either by steam or electricity, cannot always be stopped with mathematical precision at a given point. This fact is clearly demonstrated by the evidence which tends to show that the north-bound trains, in stopping at the 84th street station, would sometimes be brought to a standstill before the motor car reached 84th street, and on other occasions would run a little further to the north so as to project into 84th street.

The inevitable inference to be drawn from the plaintiff's own testimony is that it was this uncertainty as to the precise point of stoppage of the train that was in her mind when she concluded to make the "detour" of 35 or 40 feet to the north. In doing so she turned her back to the on-coming train and never looked again to see where it was, or whether it had stopped or not, although a simple turn of her head would have sufficed to gain for her this all-important information. Without a look, she put her foot upon the north-bound track. Before she could move forward, she was struck by the train which was then moving at the rate of 12 miles an hour. Without any attempt to exercise her senses of sight or hearing she stepped from the zone of absolute safety into a place of probable danger, and this at the very time when the exercise of her faculties was imperative, if her previous precautions were to be of any practical benefit. If such conduct does not properly support the legal inference of contributory negligence, then there can be no case in which the speculative finding of a jury upon that question may not be substituted for legal rules of evidence.

It may be admitted, for the argument, that the custom of stopping all north-bound trains at this station and the failure

of the defendant to give any signal or warning of its intention not to stop this particular train, might have lulled the plaintiff into a feeling of security such as described in the case of *Parsons v. N. Y. C. & H. R. R. Co.* (113 N. Y. 355, 363). The obvious answer to that suggestion is that the plaintiff's own conduct, considered in the light of the surrounding circumstances, was utterly inconsistent with that theory. When the plaintiff and her husband reached the northerly end of the stationary south-bound train the husband crossed the intervening track and, according to the undisputed testimony barely escaped collision with the on-coming train. Had the plaintiff attempted to follow even a moment later, an accident would have been inevitable. It was this emergency that must have suggested to the plaintiff the propriety of going to the north to a point beyond which the then moving train would be sure not to extend if it were going to stop at that station. Having done so much, how could the plaintiff be said to have exercised reasonable care and caution without even taking another look before stepping from her position of safety literally against the motor car which was then directly in front of her.

We do not deem it necessary to go into an extended discussion of the decided cases for, in the last analysis, the question of contributory negligence depends upon the application of well-settled legal rules to the special facts of each given case. As a general rule the question whether a person colliding with a railroad train has been guilty of contributory negligence is one of fact for a jury (*Parsons v. N. Y. C. & H. R. R. Co.*, *supra*), and, as applied to the specific facts of this case, that rule is to be considered in the light of another rule to the effect that a person who intends to take passage upon a railroad train and crosses the railroad tracks at a highway crossing commonly used for that purpose, is not held to the same strict exercise of care and caution that is required of the ordinary wayfarer along the highway. (*Terry v. Jewett*, 78 N. Y. 338; *Brassell v. N. Y. C. & H. R. R. Co.*, 84 id. 241.) Both of these rules might be successfully invoked in

support of plaintiff's contention that her alleged contributory negligence presented a question of fact for the jury, if it were not for the conclusive character of the evidence showing that plaintiff, although fully cognizant of the threatened danger, disregarded the most simple and obvious precautions for her safety that common prudence and ordinary intelligence could suggest. Having gone out of her way to avoid the train, she neglected to look for it at a time when every instinct of self-preservation and every dictate of common prudence demanded such action. Instead of attempting to cross at the usual place, relying upon the customary stoppage of the train, she had witnessed the dangerous, albeit successful, experiment of her husband, and concluded to defer her crossing to another time and place. Assuming that the plaintiff walked at the rate of four miles an hour, it would have taken her between 5 and 6 seconds to make her "detour" of 35 feet, while it would have taken the train, running at the rate of 12 miles an hour, between 8 and 9 seconds to reach the place where she attempted to cross; that point being 155 feet north of the southerly entrance to the station. Thus, although this was a matter of seconds, the plaintiff still had an appreciable period of time in which to look for the train, after she had arrived at the place where she attempted to cross and before that point had been reached by the train. These are the facts which differentiate this case from *Palmer v. N. Y. C. & H. R. R. Co.* (112 N. Y. 234); *Beecher v. Long Island R. Co.* (161 id. 222), and the other cases relied upon by the plaintiff. In all of those cases there were circumstances from which it was reasonable to draw the inference, either that such care had been exercised as was required in the circumstances, or that the necessity for such care had been obviated by conditions well calculated to lull a reasonably prudent person into a sense of security. In the case at bar the plaintiff's own testimony affirmatively establishes, not only her failure to exercise necessary care, but her evident understanding and appreciation of the conditions which attended her attempt to cross the tracks.

The judgment should be reversed and a new trial granted, with costs to abide the event.

VANN, J. (dissenting). I dissent. The plaintiff, instead of running the risk her husband ran, took greater care than he, and relying, as she had the right to, on the absence of signals and the uniform custom of the defendant, met with injury owing to its negligence. The strict rule governing travelers at a highway crossing does not apply to one who is compelled to cross tracks in order to reach a railway station, which, when a train is due, is a constant invitation to come and take it. It was the duty of the defendant to so arrange its trains that a person intending to take passage could get on one without being injured by another. The plaintiff had the right to assume, in the absence of any warning, that the north-bound train would stop where such trains always had stopped. She may have erred in judgment in believing that the defendant would do its duty and warn her if a train passed by without stopping, but since she took care to walk far around instead of following her husband straight across, she should not be turned out of court on the ground that she took no care whatever. While she did not take all the care possible, since she took some, it was for the jury to say whether she took enough, and we should not hold that she was negligent as matter of law. Strict rules are required to protect passengers and those about to enter a station intending to become passengers, and every decision which tends to undermine their safety is a misfortune to the traveling public. I vote to affirm.

CULLEN, Ch. J., HAIGHT and HISCOCK, JJ., concur with WERNER, J.; WILLARD BARTLETT, J., concurs with VANN, J.; GRAY, J., absent.

Judgment reversed, etc.

BERNHARD WELLE, Respondent, v. CELLULOID COMPANY,
Appellant.

EXPERT WITNESS—ERRONEOUS ADMISSION OF OPINION OF EXPERT UPON QUESTION OF FACT DETERMINABLE BY A JURY. It is reversible error, upon the trial of an action brought to recover for injuries caused by the slipping of a pot filled with acid from a hook by which it was to be lifted, to permit an expert witness to state, from an examination of the hook and a statement of the evidence describing the apparatus with which the pot and hook were used and the manner in which the pot slipped off the hook, that, in his opinion, the cause of the pot slipping from the hook was "from the use of a short and open-mouthed hook" furnished by the defendant; since it was for the jury to determine, from all the facts, together with the statements of experts relating to matters of which the mass of mankind are not supposed to be acquainted, whether the cause of the pot slipping from the hook was one for which the defendant was responsible; the answer to that question did not require professional or scientific knowledge or skill; it could be answered by persons of ordinary training and intelligence and was not a subject for expert opinion.

Welle v. Celluloid Co., 105 App. Div. 642, reversed.

(Argued October 11, 1906; decided November 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 30, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph Larocque, Jr., for appellant. The trial court erred in admitting the opinion evidence of plaintiff's alleged expert, Southard. (*Dougherty v. Milliken*, 163 N. Y. 527; *Harley v. B. C. Mfg. Co.*, 142 N. Y. 31; *Bookman v. Masterson*, 83 App. Div. 4; *Schutz v. U. Ry. Co.*, 181 N. Y. 33; *Winters v. Naughton*, 91 App. Div. 80; *Schneider v. R. R. Co.*, 133 N. Y. 583; *Cramer v. Slade*, 66 App. Div. 59; *Kelpy v. Triest*, 73 App. Div. 597; *Sappenfield v. M. S. & A. P. R. Co.*, 98 Cal. 486.)

Stephen C. Baldwin for respondent. The trial court did not err in admitting the evidence of the expert, Southard. (*Van Wycklen v. City of Brooklyn*, 118 N. Y. 424; *Finn v. Cassidy*, 165 N. Y. 584; *Jenks v. Thompson*, 179 N. Y. 20.)

CHASE, J. This action is brought to recover damages for personal injuries, and it has been twice tried. The facts appearing in the present record, so far as they are material to the question now considered, are substantially as stated in the opinion on the former appeal to this court, which is reported in 175 N. Y. at page 401.

The plaintiff on the trial called a witness, who, after stating his experience as a consulting and mechanical engineer, was given the hook from which the pot slipped when the plaintiff was injured, and to him was described the apparatus with which the pot and hook are used, and he was told that when the plaintiff took "hold of the top of this pot with the acid in it, in order to bring it down a little so as to put the hook in the back lug, the pot suddenly slips off the hook next to him," and then after some discussion the witness was asked:

"Q. Can you state with reasonable certainty what caused the pot to slip from the hook? Answer yes or no."

The defendant's counsel said:

"I object to that as incompetent, irrelevant and immaterial. It is taking from the jury what they are to determine in the case—the issue in the case. The facts are facts which do not call for expert opinion, and even assuming that an expert opinion is proper here, an expert can state to the jury only those facts which are not within common knowledge, from which conclusions must be drawn. Now this question calls for a conclusion from the witness as to what caused the fall of the pot."

Counsel for the plaintiff stated to the witness that he should add to the hypothesis that nothing about the appliance broke and that the hook and chain were found intact. The defendant's counsel also objected "because calling for a conclusion, and even assuming that the witness may state principles which

are not within the common knowledge of all men and from which a jury should draw their own conclusions, this witness, by this question, is called upon to draw a conclusion as to what caused the fall of the pot."

After some further discussion the court overruled the objections, and the defendant excepted; the witness answered:

"A. I can."

The examination continued:

"Q. Please do so."

The defendant's counsel: "I renew my objection on the ground that expert evidence is not competent here; that it is an ordinary question which ordinary men have full knowledge of, in addition to the other objection.

"The court: Yes, he may answer that question.

"The defendant excepted. * * *

"A. From the use of a short and open mouthed hook.

"By the court: Q. What do you call a short and open mouthed hook?

"A. That is a short and open mouthed hook."

This court has, on several occasions recently, stated the rule as to the admissibility of expert evidence. In *Dougherty v. Milliken* (163 N. Y. 527) the court say: "It may be broadly stated as a general proposition that there are two classes of cases in which expert testimony is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend upon the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject. If, in such cases, the jury with all the facts before them can form a conclusion thereon, it is their sole province to do so. In the other class we find those cases in which the conclusions to be drawn from the facts stated as well as knowledge of the facts themselves depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases, not only the facts, but the conclusions to which they lead, may be testified to by qualified experts."

In *Schutz v. Union Ry. Co. of N. Y. City* (181 N. Y. 33) the rule, as stated in *Dougherty v. Milliken*, was repeated.

The governing rule deduced from the cases permitting the opinion of witnesses is, that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exists in reasons rather than descriptive facts, and, therefore, cannot be intelligently communicated to others, not familiar with the subject, so as to possess them with a full understanding of it. (*Schwander v. Birge*, 46 Hun, 66; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424.)

Applying these rules to this case, it is clear that the witness should not have been allowed to give his opinion as to what caused the accident. It is urged that this court, on the former appeal, referred without criticism to the evidence of an expert tending to show that the new form of hook was likely to pull out on account of its shape, and that when the chain was tautened in raising the pot, the lug, instead of settling down to the base of the hook, might easily and naturally rest on the curve at the mouth of the hook, and thus what is called a forced axis be formed. The former record did not present the defendant's exceptions, but even if technical and peculiar knowledge is required to determine the tendency of the hook under specified conditions it does not follow that unusual knowledge or training is required to determine from all the evidence what caused the pot to slip from the hook.

The record presents a very simple state of facts. The accident may have been caused by the failure of a co-employee of the plaintiff to properly insert the hook in the lug, or to hold the same there until the chain had been wound around the drum of the windlass sufficiently to retain the lug in the base of the hook. The witness by his answer to the questions is allowed to weigh all of the evidence in the case and to form and express an opinion generally upon the cause of the pot slipping from the hook. When all of the facts, together with such statements by experts relating to matters of which the mass of mankind are not supposed to be acquainted, were

N. Y. Rep.]

Statement of case.

before the jury, it was for them to determine whether the cause of the pot slipping from the hook was one for which the defendant is responsible. The answer to that question did not require professional or scientific knowledge or skill. It was one which could be answered by persons of ordinary training and intelligence and was not a subject for expert opinion.

In a close case an erroneous admission of such opinion evidence may very seriously prejudice a defendant. The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, CH. J., EDWARD T. BARTLETT, HAIGHT, VANN and HISCOCK, JJ., concur; GRAY, J., absent.

Judgment reversed, etc.

MICHAEL STENGER, Appellant, v. THE BUFFALO UNION FURNACE COMPANY, Respondent.

NEGLECT. The facts examined in an action to recover for injuries to plaintiff resulting from the defective condition of a blast furnace at which plaintiff was employed, by reason of which a much larger quantity of gas was allowed to escape than would have escaped if the furnace had been kept in good repair, whereby the plaintiff was made unconscious, and, falling into the hopper of the furnace, received severe burns and injuries and, *held*, that the evidence was sufficient to sustain a verdict for plaintiff.

Stenger v. Buffalo Union Furnace Co., 107 App. Div. 621, reversed.

(Argued October 18, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 22, 1905, which reversed a judgment in favor of plaintiff, entered upon a verdict and an order denying a motion for a new trial, and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

George H. Kennedy for appellant. It was a question for the jury whether the gas which overcame the deceased and

caused him to fall into the hopper came from the defects existing in the furnace. (*McHugh v. M. Ry. Co.*, 179 N. Y. 378; *Nelson v. City of New York*, 101 App. Div. 18; *Eastland v. Clark*, 165 N. Y. 420; *Welle v. Celluloid Co.*, 175 N. Y. 401; *Kiras v. N. C. Co.*, 59 App. Div. 79; *Davidson v. Cornell*, 132 N. Y. 228; *McGovern v. C. V. R. R. Co.*, 123 N. Y. 280; *Dowd v. N. Y., O. & W. R. R. Co.*, 170 N. Y. 459; *Leland v. Hearn*, 49 App. Div. 111; *Devereux v. U. S. C. Mills*, 84 App. Div. 34.)

Clinton B. Gibbs for respondent. The plaintiff did not meet the burden of proof resting upon him to establish by a fair preponderance of evidence that he had been overcome by gas, or had fallen, or received his injuries through any cause for which the defendant can be blamed. (*Stenger v. B. U. F. Co.*, 98 App. Div. 361; *Witlock v. F. & C. Co.*, 149 N. Y. 49; *F. L. & T. Co. v. Siefke*, 144 N. Y. 354; *Hule v. Smith*, 78 N. Y. 480; *Heinemann v. Heard*, 62 N. Y. 448; *Ring v. Cohoes*, 77 N. Y. 83; *Jones v. Union R. Co.*, 18 App. Div. 267.) There is no evidence in the case that the plaintiff was overcome by gas that leaked into the air because of the defendant's negligence, any more than by the gas that got there through natural and unavoidable conditions. (*Ring v. Cohoes*, 77 N. Y. 83; *Searles v. M. R. Co.*, 101 N. Y. 662; *Taylor v. City of Yonkers*, 105 N. Y. 571; *Ayres v. Village of Hammondsport*, 130 N. Y. 665; *Rider v. S. R. T. R. Co.*, 171 N. Y. 139; *Williams v. D., L. & W. R. R. Co.*, 39 Hun, 430; *Malone v. B. & A. R. R. Co.*, 51 Hun, 532; *Koch v. Fox*, 71 App. Div. 288.)

HAIGHT, J. This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant on the 17th day of April, 1903.

- The defendant was the owner operating a blast furnace in the city of Buffalo, and the plaintiff was in its employ and worked on the top of the furnace. The furnace was about

eighty feet high, circular in shape, with a diameter at the base of twenty-two feet, and at the top of about fourteen feet. The top was covered with what is called an iron hopper in the form of a suspended cone extending down into the furnace with a circular opening in the center, through which is suspended a large bell-shaped casting, so adjusted to an iron beam over the top of the furnace that it could be raised up into the hole in the center of the hopper sufficient to close it and prevent the escape of gas and fire. When in operation the furnace is fed from the top. The coke or fuel is raised up from the ground by mechanical appliances, in what are called buggies, and then with the scrap iron or iron ore is dumped into the hopper, and at frequent intervals the bell is lowered, allowing the contents of the hopper to slide down through the opening, and, by reason of the flange of the bell, distributed around the outer sides of the furnace, where it becomes fused from the fire and heat beneath. After the contents of the hopper has thus been discharged the bell is again raised up, closing the hole, thus permitting the refilling of the hopper. To facilitate the dumping of the buggies into the hopper there was a platform constructed at the top of the furnace with a small house at one end, some distance from the furnace, in which the men could stay and be shielded from the fire and gas escaping from the furnace when the bell was lowered, and from which they could pass to the top of the furnace when necessary to dump a buggy filled with fuel or ore. The plaintiff and his brother were in the employ of the defendant engaged in dumping the material into the hopper, and from thence into the furnace from time to time by the lowering of the bell. About four o'clock in the morning of the day of the accident, the plaintiff was in the house referred to upon the top of the platform with his brother. A buggy of material had come up from below, and his brother went out to the top of the furnace to dump it. The brother remaining longer than usual, the plaintiff stepped out to see what had become of him, and as he did so he saw him stagger and then fall into the hopper. The plaintiff, as

he tells us, then called for help, and instantly ran to the top of the furnace and reached down with one hand to get hold of his brother, and in doing so he himself inhaled gas, fell upon the hopper and became unconscious. He was shortly thereafter rescued, taken down to the ground and revived, but his brother died. The plaintiff received severe burns which laid him up for several weeks, and it is for the injuries so received that the jury has awarded him damages.

The questions presented upon this review are as to whether the plaintiff presented any evidence from which the jury could have found negligence on the part of the defendant, and the want of contributory negligence on the part of the plaintiff. In order to answer these questions, it will become necessary to examine with some care the evidence produced upon the trial as to the manner in which this furnace was equipped and operated. It appears that in the operation of a blast furnace a great amount of gas is generated, and that of necessity a considerable quantity escapes and impregnates the atmosphere. When the bell is lowered so as to permit the coke and ore to slide into the furnace, the gas and a flame of fire shoots out into the air in great quantities. It also appears that a pipe had been constructed from the top of the furnace running down to the bottom, through which the gas was conducted and there made to serve as fuel to the fire inside of the furnace. There were also constructed near the top of the furnace two large steel doors, which hung upon hinges hanging downward so that they would close by their own weight, which were called explosion doors. Their purpose was to relieve the furnace when the pressure of gas inside became too great; on such occasions the doors would fly up allowing the gas to escape and thus relieve the furnace from the over-pressure. The defendant had constructed the house in question to shelter the men and to guard them against injury while working on the top of the platform, by reason of the escape of fire and gas from these sources. It had also so arranged that it was necessary for but one man to go out at a time to dump a buggy, and then to remain but a brief time,

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

and had provided shifts of men to take the places of those upon the platform at frequent intervals or whenever any one felt the ill effects of the escaping gas. The company had also provided clay with which to fill in the cracks around the explosion doors, and salamoniac and iron borings to fill in around the iron plates of the hopper, in order to prevent as far as possible the escape of gas from the furnace. These precautions taken on the part of the defendant were doubtless ample and sufficient to afford reasonable protection to the men in its employ if they observed proper care and caution. But it is now claimed on behalf of the plaintiff that the defendant had permitted the furnace to get sadly out of repair, and that by reason thereof a much larger quantity of gas was allowed to escape than would have had the furnace been kept in good repair, and that the injury to the plaintiff resulted in consequence of such escape. This brings us to a consideration of the controverted evidence in the case. It distinctly appears from the testimony of several witnesses produced on the part of the plaintiff that the explosion doors were not only cracked but badly warped; that there was a displaced brick under the hopper so as to leave an opening between the hopper and the brickwork of from four to six inches; that some of the plates had been cracked and that one had been removed; that one explosion door was unpacked with clay, and that it was vibrating back and forth by reason of the gas inside, and that the foreman in charge had refused to stop the blowpipe from beneath sufficiently long to allow the door to be packed. This evidence was all sharply controverted by the defendant's witnesses, whose testimonies tended to show that the furnace was in proper condition and repair. The learned presiding justice, writing for the Appellate Division, in granting a new trial, conceded that the evidence bearing upon this question was of such a character as to raise a question of fact as to that issue, and justified the jury in finding that the defendant was negligent in respect to those matters. But following such concession he then proceeded to state that, "The serious question presented by this appeal

is whether or not there is any evidence which tends to show that any gas has escaped because of either of the defects referred to and from which the injury to the plaintiff resulted." And then, after considering the evidence, he reached the conclusion that there was no such evidence. In this particular we have reached a different conclusion.

Assuming, as we must from the verdict rendered, that the defects complained of existed at the top of the furnace, it is within the common knowledge and experience of ordinary men at the present day that the gas generated in the operation of a furnace of this character will escape in large quantities through the cracks and holes described by the witnesses. Indeed, this is conceded by several of the defendant's witnesses. They even go to the extent of claiming that in case the cracks and holes were of the dimensions claimed by the plaintiff's witnesses it would not be possible for men to work there, that the gas would escape in such volumes that it would consume and burn them up. The defendant's witness Smoot, on cross-examination, said: "If you have these holes they testified to in these plates, the gas would come up." Thomas Marron, the defendant's yard superintendent, said: "Gas always exists at the top of a furnace while it is in blast or in operation. It comes from the combustion of the stock inside, coming up through the pores of the brick. There is no way to confine it absolutely. It will escape the best you can do to prevent it and it passes into the air above the furnace. * * * If holes three-quarters of an inch to an inch wide and four feet long existed at the bell extension and at the hopper extension of three feet long, it would not be possible for the men to work there on account of the escape of such a large volume of gas. It would consume the men, burn them up. After it struck the air and was ignited it would be flame. It would blow anywheres from ten to twenty feet high. The men could not work there. They would burn up. It is not possible to operate a furnace under such conditions." Schroeder, another of the defendant's witnesses, testified that: "All furnaces leak more or less gas. It will

N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

penetrate right through the brick. * * * If there was a hole three-fourths of an inch in width and four feet or one-half an inch in width or three feet long in the bell extension, it would be impossible to operate the furnace because the gas and flame would come out through these openings and the men could not work there." Patrick O'Brien, another of the defendant's witnesses, testified that he was working at the furnace at the time the plaintiff was injured. He said it was very gassy that night at the top of the furnace because of the east wind, and also that he was taken down from the furnace that night because he was overcome and gassed at the time of this accident; that it was very gassy up there; said he was affected by the gas; that it affected his knees and that it overcame him altogether. It thus appears to us that there was evidence which tended to show that if the appliances at the top of the furnace were out of order by reason of cracks or holes that the gas would escape through such openings and augment or increase the danger to the men working upon the platform over and above that which necessarily existed with the appliances in good condition and repair, and that the jury might have found that the injury which the plaintiff suffered was in consequence of such increased discharge of gas.

Some exceptions were taken by the defendant to the admission and rejection of evidence upon the trial. The Appellate Division did not discuss any of them and none of them were orally argued. We have examined them and have reached the conclusion that no error of sufficient importance to justify a reversal was committed by the court.

The order of the Appellate Division should be reversed and the judgment entered upon the verdict affirmed, with costs to the plaintiff in the Appellate Division and this court.

CULLEN, Ch. J., VANN, WERNER and WILLARD BARTLETT, JJ., concur; GRAY, J., absent; HISCOCK, J., not sitting.

Ordered accordingly.

ARNOLD LEO et al., Comprising the Firm of ARNOLD LEO & Co., Respondents, v. JOHN L. McCORMACK, Appellant.

1. PRINCIPAL AND AGENT—FRAUD OF PRINCIPAL A DEFENSE TO ACTION BY AGENT TO RECOVER PURCHASE PRICE OF STOCK SOLD. A defense that the owner of stock induced its sale by fraud is available to the purchaser in an action to recover the purchase price, brought by the broker who made the sale, since the relationship existing between a Stock Exchange broker and a customer is not so peculiar as to exempt it from the ordinary principles and rules of agency.

2. WHEN PRINCIPAL'S FRAUD NO BAR TO RECOVERY OF AMOUNT ADVANCED HIM BY BROKER ON STOCK SOLD. Where, however, the stock sold was held on margin, the broker has a lien thereon to the amount of his advances, and if not a party thereto, his principal's fraud is no bar to a recovery of such amount.

Leo v. McCormack, 105 App. Div. 642, reversed.

(Argued October 11, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 16, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

William J. Leitch for appellant. In the execution of his client's order for the purchase or sale of stock a broker is an agent. (26 Am. & Eng. Ency. of Law [2d ed.], 1055; 1 Dos Passos on Stockbrokers [2d ed.], 219, 227, 228, 297; Helliwell on Stock & Stockh. 360, § 196; 2 Cook on Corp. [5th ed.] 777, 903, 909, 916, 928; *Zimmerman v. Heil*, 86 Hun, 114; 156 N. Y. 703; *Northrup v. Shook*, 10 Blatchf. 243; *Galagher v. Jones*, 129 U. S. 193; *Taussig v. Hart*, 58 N. Y. 425; *Porter v. Wormser*, 94 N. Y. 431; *Clews v. Jamieson*, 182 U. S. 461; *Prout v. Chisolm*, 21 App. Div. 54.) The title to the stock tendered to defendant was in plaintiffs' principals and the plaintiffs' only interest therein was as pledgee. (*Markham v. Jaudon*, 41 N. Y. 235; *Gruman v. Smith*, 81 N. Y. 25; *Rothschild v. Allen*, 90 App. Div. 233; *Douglas*

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

v. Carpenter, 17 App. Div. 329; *Matter of Pierson*, 19 App. Div. 478; *Le Marchant v. Moore*, 150 N. Y. 209; 26 Am. & Eng. Ency. of Law [2d ed.], 1057; Jones on Pledges & Coll. 526, § 495; *Cuswell v. Putnam*, 120 N. Y. 153; *Tausseig v. Hart*, 58 N. Y. 425; *Harding v. Field*, 1 App. Div. 391; *Horton v. Morgan*, 19 N. Y. 170.)

Herbert Noble and Massey Holmes for respondents. The plaintiffs and the defendant were principals in the contract for the sale and purchase of the stock; the relation between plaintiffs and Cosmides was not that of principal and agent in any sense which could enable the fraudulent scheme of Cosmides to be imputed to plaintiffs so as to defeat a recovery in this action. (Dos Passos on Stockbrokers [2d ed.], 751; *M. T. & S. Co. v. Ward*, 133 Fed. Rep. 70; *Nourse v. Prime*, 4 Johns. 490; *Horton v. Morgan*, 19 N. Y. 170; *Markham v. Jaudon*, 41 N. Y. 235; *Baker v. Drake*, 53 N. Y. 211; *Stenton v. Jerome*, 54 N. Y. 480; *Gruman v. Smith*, 81 N. Y. 25; *Gillett v. Whiting*, 120 N. Y. 402; *Cuswell v. Putnam*, 120 N. Y. 153; *Zimmerman v. Heil*, 86 Hun, 114; *Harding v. Field*, 1 App. Div. 391.)

Hiscock, J. The plaintiffs and defendant are brokers, the latter dealing on the curb. The former, acting for certain customers, sold to the latter, acting for an undisclosed customer, 150 shares of stock at \$40.00 per share, and this action is brought to recover said purchase price. The defendant has refused to pay the same upon the ground that the persons owning said stock were guilty of fraud in effecting its sale to him, and that such fraud constitutes a defense against plaintiffs, who were their agents. The learned courts below have respectively directed and affirmed the direction of a verdict for plaintiffs upon the ground that the ordinary rules of principal and agent did not apply to the plaintiffs as brokers. We think such error has been committed in this disposition of the case as calls for a reversal of the judgment.

Prior to the date of the sale in question plaintiffs, acting as

brokers, had purchased and were then carrying upon a margin for one Uhren fifty shares, and for one Cosmides upwards of one hundred shares, of the capital stock of the Snap Hook and Eye Company. Said customers ordered plaintiffs to sell on the curb Uhren's stock and one hundred shares of that belonging to Cosmides. Before this order and the hour of its execution these customers, acting with others, had concocted a contemptible fraud by which to entice the defendant to buy said stock so ordered to be sold, which was absolutely worthless, for an utterly irresponsible purported customer, and the defendant fell a victim to the scheme. Defendant's pleadings have prevented him from establishing, if he could have done so, that plaintiffs were parties to or cognizant of the scheme when they received and executed the order of the conspirators.

We do not gather that the courts below doubted, or that the plaintiffs deny, that the fraud of plaintiffs' customers would, under ordinary circumstances, be a bar to an action brought by an agent to enforce a contract made in their behalf. It has, however, been strenuously urged and thus far found that there is something so peculiar about the relation between a broker and his customer that the same is not subject to the ordinary principles and rules of agency. It very likely may be conceded that, as the result of long usage and of various rules made by the Stock Exchange, some exceptions have been engrafted upon the general rules of principal and agent for the particular benefit and help of brokers. But we are aware of no reason and no adjudication which should or does exempt such relationship from the fundamental principles which are applicable to other phases of the relation of agency. In this particular case, upon the order and request of Cosmides and Uhren, the plaintiffs had bought for them certain shares of stock which they then held and carried for their respective accounts. These parties ordered plaintiffs to sell said stock and they did so, delivering, as it appears, the identical certificates which had been taken and carried for their customers. Under such circumstances, it would require

N. Y. Rep.] Opinion of the Court, per Hiscock, J.

some justification with which we are unacquainted to lead us to say that the customers were not the principals and that the plaintiffs were not their agents in the transaction and governed as such by the general rules of law upon that subject. Reaching this conclusion, it is, as we have said, substantially conceded that the fraud of the customers is to be imputed to the plaintiffs as their representatives.

There is, however, still another aspect to this case. The plaintiffs had received margins from their conspiring customers to the apparent extent of about fifty per cent of the price originally paid for the stock, which was about forty dollars per share. The balance of this purchase price the brokers had advanced, and for this amount they were pledgees in possession of, and having a lien upon, the stock. Their customers were not entitled to effect a sale of the stock without the concurrent action of the brokers as pledgees, and, therefore, in making the sale the plaintiffs acted in a dual capacity of brokers and agents for their customers and as pledgees in their own behalf for the amount which they had advanced. As to their own interest as pledgees, we think it may be said that they acted as principals and, therefore, are not contaminated by or charged with the fraud of their customers so as to prevent their recovery of that portion of the purchase price which shall be equivalent to the amount of their lien.

Another reason has been urged why plaintiffs should be allowed to recover the entire amount of the selling price. It appears that immediately after the sale, without waiting to receive from defendant the amount which he had promised to pay, plaintiffs by two checks paid to their customers four thousand dollars which seems to have been about all that was due to them over plaintiffs' advances. Evidence has been given of the custom of brokers to pay to their customers the proceeds of stock sales before actually received, and it is urged that by these payments plaintiffs have so changed their position that defendant ought not to be allowed to interpose his defense. This argument does not commend itself to our approval. There are some things in the record which suggest

the idea that the plaintiffs are making this fight for the benefit of their discredited principals and have been willing to so adjust matters between themselves and the latter as to fortify the claim for recovery. Assuming, however, that these payments were made in perfect good faith, we know of no reason why defendant's rights should be injured by them. The evidence introduced upon this subject seems simply and only to indicate that if a broker selling stock believes that his customer is reputable and responsible he sometimes pays the proceeds to him in advance, thereby trusting him to that extent. Defendant was in no way a party to plaintiffs' alleged confidence in their unworthy customers, and we think he should not be made to suffer if it has been misplaced.

In accordance with these views, the judgment appealed from should be reversed and a new trial granted, with costs to appellant in both courts to abide the event.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur; GRAY, J., absent.

Judgment reversed, etc.

CHARLES COOPER, Respondent, v. HENRY B. PAYNE,
Appellant.

EVIDENCE — ADMISSIBILITY OF PAROL EVIDENCE TO COMPLETE WRITTEN AGREEMENTS EXECUTED SUBSEQUENT TO AN ORAL CONTRACT. Parol evidence of an express warranty of a machine sold and delivered under an oral contract is admissible, where supplementary written agreements, under which it is claimed the machine was sold, examined in the light of all the facts and circumstances, do not contain the entire agreement of the parties, but are merely modifications of the original oral contract in respect to the terms of payment, and such evidence is not inconsistent with or contradictory of the written agreements.

Cooper v. Payne, 108 App. Div. 118, reversed.

(Argued October 24, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 20, 1905, affirming a judgment in favor of plaintiff

entered upon a verdict directed by the court and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry F. Borst for appellant. There was an implied warranty by the plaintiff that the machine was fit for the special purpose for which it was designed. (*Edwards v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 247; *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 145; *Bierman v. City Mills Co.*, 151 N. Y. 489; *McClure v. Central Trust Co.*, 165 N. Y. 123.) An implied warranty survives, notwithstanding a written contract containing no warranty. (*Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 146; *Hamilton v. Ganyard*, 2 Abb. Ct. App. Dec. 314; *Studer v. Bleistein*, 115 N. Y. 325; *Taylor v. Saxe*, 134 N. Y. 67; *Wegenaur v. Dechow*, 33 App. Div. 13; *Pierson v. Crooks*, 115 N. Y. 539; *Stone v. Browning*, 68 N. Y. 599.) The trial court erred in refusing to allow the defendant to show that the plaintiff had expressly warranted the machine. (*Briggs v. Hilton*, 99 N. Y. 517; *Thomas v. Scutt*, 127 N. Y. 138; *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 147.)

Andrew J. Nellis and *J. S. Sitterly* for respondent. The proof did not disclose any express warranty and none could be implied. (2 Benj. on Sales [6th ed.], § 987; *D. C. D. Co. v. Mallory*, 69 L. R. A. 973; *McClure v. C. T. Co.*, 165 N. Y. 108; *Smith v. Coe*, 170 N. Y. 169; *Seitz v. B. R. M. Co.*, 141 U. S. 510.) The agreements for the sale of the machine being in writing, after plenty of opportunity for inspection, a parol warranty can in no wise enlarge their provisions; consequently no error was committed in the rejection of proffered testimony. (*Mumford v. McPherson*, 1 Johns. 414; *Enghmie v. Taylor*, 98 N. Y. 288; *L., etc., Co. v. Hartung*, 46 N. Y. S. R. 191; *Englehorn v. Reitlinger*, 122 N. Y. 76; *Leichtenstein v. Rabolinski*, 90 N. Y. Supp. 247; *Ruse v. M. B. L. Ins. Co.*, 23 N. Y. 516; Benj. on Sales, § 610.)

WERNER, J. The action is upon a promissory note which is one of several notes given by the defendant to the plaintiff for a part of the purchase price of a knitting machine sold by the latter to the former. The defendant's answer alleges the breach of an express warranty as to the character, quality and amount of work which this machine was designed to do. Evidence was offered to support these allegations and excluded upon the theory that it was inadmissible to vary the terms of the contract, which the learned trial court regarded as having been wholly reduced to writing. The questions presented by the various exceptions to the rulings in this behalf might be discussed in detail and at length, but as the whole controversy depends primarily upon the nature of the contract, we shall consider the case broadly and briefly from that point of view.

The negotiations between the parties began in November, 1902, when the plaintiff offered to sell to the defendant a knitting machine described in a submitted catalogue. This was followed in December by the plaintiff's acknowledgment of an order for a machine at the price of \$1,255, payable "net 30 days." The machine in question was delivered to the defendant on the 3d day of April, 1903, and remained unused in the factory of the latter until May 26th, 1903, when the parties signed in duplicate a written instrument reciting a present conditional sale of the machine by the plaintiff to the defendant, the reservation of title in the former, and the promise of the latter to pay for the same upon demand. From that time until December 1st, 1903, the machine was still left in its shipping wrappings at the defendant's factory, and on the latter date the parties executed another written instrument reciting the sale and delivery of the machine on April 3rd, 1903, the non-payment of the purchase price and interest, and providing for a new time and method of payment as witnessed by the notes upon one of which this action is brought. Contemporaneously with the execution of the last-mentioned paper and the notes in question, there were oral negotiations as to the setting up of the machine and getting it into operation. The plaintiff sent a man to start the machine, but,

N. Y. Rep.] Opinion of the Court, per WERNER, J.

according to the evidence of the defendant, it failed to work after several trials, and this suit followed. The record contains much of the voluminous correspondence between the parties. It is interesting in its revelations of their practical attitude towards each other, and has some bearing upon the decisive question in the case, but on account of its volume we refrain from quoting it. It is enough to say that upon the record as made by this correspondence and the written instruments above referred to, the learned trial court held that the alleged express warranty relied upon by the defendant did not survive the execution of these writings under which it was assumed that the defendant had purchased and accepted the machine. The logical corollary of this view was the exclusion of all proffered oral testimony as to an express warranty, and the necessary effect of the rulings in that behalf was to deprive the defendant of any chance to make a case for the consideration of the jury. Upon defendant's appeal to the Appellate Division the judgment entered upon the directed verdict was affirmed.

We think both of the learned courts below entertained an erroneous view of the two written instruments under consideration. They are clearly not the full and complete repositories of the understanding of the parties. They are not only separate writings of different dates subsequent to the actual sale and delivery of the machine, but they are obviously supplemental to an oral contract pursuant to which sale and delivery were consummated. A glance at these writings in the light of the undisputed facts and the mutual attitude of the parties clearly reveals their very limited character. The first writing was dated May 26th, 1903. The machine had in fact been sold and delivered on April 3d, 1903, and the correspondence shows that the parties regarded it as a consummated sale as of that date. In view of these circumstances the mere recital in the instrument of May 26th of a present sale is not controlling. Passing this recital and going to the substance of the document, we see that it is nothing more nor less than an arrangement for extending to the defendant his time of payment, which was then overdue, and giving to the

plaintiff security for his forbearance. The whole context bears out this view and the subsequent correspondence indicates that this was the understanding of the parties. In no aspect can any of its provisions be said to be inconsistent with an oral warranty of quality and workmanship. Even more unmistakable in its import is the instrument dated December 1st, 1903. That recites a sale and delivery as of April 3rd, 1903, the continued indebtedness of the defendant to the plaintiff, and the promise of the former to pay according to the newly stipulated terms. It distinctly recognizes the existence of the contract of April 3rd, and we look through it in vain for a single written word that will be contradicted or rendered nugatory by proof of an oral warranty. The more these two instruments of May 26th and December 1st are studied in connection with the circumstances surrounding their execution, the more evident it becomes that they do not purport to contain the full agreement of the parties, but are merely modifications of the original oral contract in respect of the terms of payment.

We, therefore, conclude that the case at bar is within the rule laid down in *Chapin v. Dobson* (78 N. Y. 74) and approved in *Eighmie v. Taylor* (98 N. Y. 288), to the effect that the prohibition against the reception of parol evidence to vary or modify a written contract, cannot be invoked where the original contract was verbal and entire and a part only was reduced to writing. The application of that rule to this case is made so plain in *Thomas v. Scutt* (127 N. Y. 133) that we may safely close our discussion of this question with a brief quotation from the opinion in that case. In classifying the cases which are exempt from the rule that a complete written contract cannot be modified or contradicted by parol evidence, Judge VANN says: "The second class embraces those cases which recognize the written instrument as existing and valid, but regard it as incomplete either obviously, or at least possibly, and admit parol evidence, not to contradict or vary, but to complete the entire agreement of which the writing was only a part. * * * Two things, however,

are essential to bring a case within this class: 1. The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract. 2. The parol contract must be consistent with and not contradictory of the written instrument." This extract we regard as a compendium of the law applicable to this case, and it follows that the defendant should have been allowed to make proof, if he could, of the express oral warranty alleged in his answer.

The judgment herein should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., EDWARD T. BARTLETT, WILLARD BARTLETT and HISCOCK, JJ., concur; GRAY, J., absent; CHASE, J., not sitting.

Judgment reversed, etc.

MORRIS ULLMAN et al., Respondents, v. ALBERT L. CAMERON, Individually and as Trustee under the Will of JANE M. CAMERON, Deceased, Appellant, Impleaded with Others.

1. TRUSTS—WHEN TESTAMENTARY TRUST VOID AS TO CREDITORS OF CESTUI QUE TRUST. A testamentary trust to pay to the husband of testatrix all of the income and such part of the principal of the estate as might be necessary for his support and maintenance, and whenever he should "desire to engage in any business or enterprise" to pay him, upon notice, "the whole or any part of such principal," is void as to creditors, and a judgment obtained against him after the death of testatrix is an enforceable lien against real estate covered by the attempted trust.

2. SAME—WHEN JUDGMENT CREDITORS MAY MAINTAIN ACTION TO CHARGE PROPERTY HELD UNDER TRUST—RECEIVER IN SUPPLEMENTARY PROCEEDINGS NOT NECESSARY PARTY PLAINTIFF. Judgment creditors of such *cestui que trust* are proper parties plaintiff in an action in equity to have the attempted trust adjudged void and the land covered by the trust charged with the payment of their judgment, and may maintain such action, notwithstanding a receiver has been appointed in proceedings supplementary to the return of an unsatisfied execution, issued upon their judgment, since the appointment of the

receiver did not transfer the lien of the plaintiffs' judgment to him. He took the land subject to their lien. They still owned it and had a right to enforce it. They had a cause of action for that purpose which was exclusively their own, and in which he had no interest. They did not assign their judgment to him by procuring his appointment, nor did they thereby assign their lien to him, or estop themselves from enforcing it.

Ullman v. Cameron, 105 App. Div. 159, affirmed.

(Argued October 19, 1906; decided November 13, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 15, 1905, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint.

The case made by the amended complaint is that the plaintiffs are judgment creditors of one Charles E. Cameron, with an execution returned unsatisfied and a receiver appointed in proceedings supplementary to the execution issued upon their judgment. The judgment was recovered on the 11th of July, 1901. Early in January, 1900, one Jane N. Cameron, wife of the said Charles, died, leaving a last will and testament, the material parts of which are as follows:

"*First.* I hereby, give, devise and bequeath all of my estate, both real and personal of every name, kind and nature whatsoever, in trust for the uses and purposes hereinafter named, to Albert L. Cameron of Smithfield, N. Y., my Executor hereinafter named.

"*Second.* I hereby will and direct the said Albert L. Cameron to pay over to my husband, Charles E. Cameron, semi-annually, all of the income, rents, issues and profits of my said estate and so much of said principal sum as may be necessary for his support and maintenance for and during the term of his natural life.

"*Third.* I further will and direct that whenever the said Charles E. Cameron shall desire to engage in any business or enterprise and shall give notice thus to the said Albert L. Cameron that he desires the whole or any part of such principal sum for such purpose it is my will, and in that case I

N. Y. Rep.]

Statement of case.

hereby direct the said Albert L. Cameron to pay over and deliver to the said Charles E. Cameron the amount so desired by him out of the principal sum so given to him in trust by the first clause hereof.

"*Fourth.* I hereby give, devise and bequeath all the rest, residue and remainder of the said trust estate created by the first clause hereof which shall remain in the hands of said Albert L. Cameron as such trustee or executor after the death of my said husband to my sister, Lucy Morrison, and to Ann M. Cameron, my husband's sister, and to John T. Cameron, Albert L. Cameron and Delos W. Cameron, brothers of my said husband, share and share alike, and to their heirs and assigns forever. And it is my will and I hereby direct the said Albert L. Cameron to pay over and deliver such remainder as herein provided."

By the fifth and last clause Albert L. Cameron was appointed sole executor, with full power to execute said trust.

Mrs. Cameron, the testatrix, left some household furniture of small value and a bond and mortgage worth \$3,500, but no real estate, although in July, 1901, the land covered by the mortgage was conveyed to Albert L. Cameron, "as trustee as aforesaid," in satisfaction of said bond and mortgage, and upon the same trust under which they were held. The remaindermen named in the fourth clause, as well as the receiver, were made parties defendant when the complaint was amended by order of the court after a trial, but no reason was set forth therein why the receiver should not have been made the party plaintiff. The relief demanded is that the trust purporting to be created by the will be adjudged void as to the plaintiffs and the property covered by the alleged trust be charged with the payment of their judgment. There is also a prayer for an accounting.

The defendant Albert L. Cameron demurred to the complaint upon the following grounds: "*First.* That the plaintiffs have no legal capacity to sue in that the title to the said cause of action is in the defendant, William E. Lounsbury, as Receiver, and that the plaintiffs have no title to the same.

"Second. That there is a defect of the parties plaintiff in that the plaintiffs are not the proper parties to bring this action; that if any cause of action exists, as alleged in the complaint, it belongs to the defendant, William E. Lounsbury as Receiver, and that he should be the party plaintiff, and that the defendant, William E. Lounsbury, as Receiver, should not be made a party defendant to the said action.

"Third. That the complaint does not state facts sufficient to constitute a cause of action."

The judgment rendered at the Special Term overruling the demurrer was affirmed by the Appellate Division, but subsequently leave was given to appeal to this court and the following questions certified for review:

"First. Should the demurrer of Albert L. Cameron, defendant individually and as trustee, be sustained upon the ground that the plaintiffs have not legal capacity to sue, in that the title to the said cause of action is in the defendant, William E. Lounsbury as Receiver, and that the plaintiffs have no title to the same?

"Second. Should the demurrer be sustained upon the ground that there is a defect of parties plaintiff in that the plaintiffs are not the proper parties to bring this action; that if any cause of action exists as alleged in the complaint it belongs to the defendant, William E. Lounsbury as Receiver; that he should be the party plaintiff and not be a party defendant to the said action?

"Third. Should the said demurrer be sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action?"

M. H. Kiley for appellant. The plaintiffs have no legal capacity to sue, in that the title to the said cause of action is in the defendant William E. Lounsbury, as receiver, and the plaintiffs have no title to that cause of action; if any cause of action exists, and if any action can be maintained, it must be enforced and maintained by the defendant William E. Lounsbury as plaintiff. (Code Civ. Pro. §§ 2468,

N. Y. Rep.]

Opinion of the Court, per VANN, J.

2469; *McCorkle v. Herman*, 117 N. Y. 297; *Maston v. Amerman*, 51 Hun, 244; *Dubois v. Cassidy*, 75 N. Y. 298; *Webb v. Osborne*, 27 N. Y. S. R. 792; *F. Nat. Bank v. Martin*, 49 Hun, 571; *Matter of Castle*, 2 N. Y. S. R. 363; *Rodman v. Henry*, 17 N. Y. 482; *W. Bank v. Pugsley*, 47 N. Y. 372; *Payne v. Becker*, 87 N. Y. 153; *Charlier v. S. S. S. Co.*, 7 App. Div. 609.) The complaint does not state facts sufficient to constitute a cause of action. (*Gilman v. Reddington*, 24 N. Y. 9; *Cutting v. Cutting*, 86 N. Y. 522; *Lent v. Howard*, 89 N. Y. 169; *Hogan v. Curtin*, 88 N. Y. 162; *Cuthbert v. Chauvet*, 136 N. Y. 326; *Bliven v. Seymour*, 88 N. Y. 469.) Reading all of the provisions of this will together, absolute power of disposition was not given and was not intended to be given to the *cestui que trust*. (*R. I. T. Co. v. Nat. Bank*, 14 R. I. 625; *Smith v. Van Ostrand*, 64 N. Y. 278; *Rose v. Hatch*, 125 N. Y. 427; *F. Nat. Bank v. Miller*, 24 App. Div. 551; *Leggett v. Firth*, 132 N. Y. 7; *Wager v. Wager*, 96 N. Y. 164.)

T. B. Merchant and *L. M. Merchant* for respondents. Respondents are the proper parties plaintiff. (Code Civ. Pro. § 488, subd. 3; *Boughton v. Allen*, 11 Paige, 321; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Simson v. Sutterlee*, 64 N. Y. 657; *Chadeayne v. Girger*, 83 App. Div. 403; *Nat. Bank v. Bussing*, 147 N. Y. 665; *Dubois v. Cassidy*, 75 N. Y. 298; *Wright v. Nostrand*, 94 N. Y. 31; *I. & T. Nat. Bank v. Quackenbush*, 143 N. Y. 567; *Manderille v. Avery*, 124 N. Y. 376.) The complaint states facts sufficient to constitute a cause of action. (*Hullett v. Thompson*, 5 Paige, 583; *Degraw v. Cluson*, 11 Paige, 136; *Palmer v. Hullock*, 94 App. Div. 485; *Clute v. Bool*, 8 Paige, 83; *Wells v. Ely*, 11 N. J. Eq. 172; *Arzbacker v. Mayer*, 53 Wis. 380; *Campbell v. Foster*, 35 N. Y. 361; *Wendt v. Walsh*, 164 N. Y. 154; *Frazer v. Western*, 1 Barb. Ch. 220; *Sterrick v. Dickinson*, 9 Barb. 516.)

VANN, J. That the plaintiffs were under no legal disability, such as infancy, lunacy or the like, and, hence, had a legal

capacity to sue, cannot be seriously disputed according to the authorities, which make a clear distinction between "incapacity to sue" and "insufficiency of facts to sue upon." (*Ward v. Petrie*, 157 N. Y. 301, 311; *Bank of Havana v. Magee*, 20 N. Y. 355, 359.)

The appellant, however, contends that the receiver is not a proper party defendant because he should have been the sole plaintiff; and that the respondents are not proper parties plaintiff inasmuch as the cause of action, if any is set forth, belonged exclusively to the receiver.

If the trust is invalid as to creditors, title to the property covered thereby vested in Charles E. Cameron, the judgment debtor, in January, 1900, when his wife died, at least so far as the claims of creditors are concerned. The plaintiffs recovered their judgment in July, 1901, and during that month the most of the property was converted into real estate through the conveyance of the land covered by the mortgage to the trustee. The plaintiffs' judgment thus became a lien upon said real estate in July, 1901, and they had a cause of action in equity to set aside the trust as to them and enforce their lien. In February, 1902, the receiver was appointed, but that did not transfer the lien of the plaintiffs' judgment to him. He took the land subject to their lien. They still owned it and had a right to enforce it. They had a cause of action for that purpose which was exclusively their own, and in which he had no interest. They did not assign their judgment to him by procuring his appointment, nor did they thereby assign their lien to him, or estop themselves from enforcing it. Conceding that the property which was still personalty when the receiver was appointed vested in him with the exclusive right to appropriate it to the payment of the plaintiffs' debt, still he had no right to the lien of the plaintiffs' judgment on the real estate, and, hence, they had a cause of action, which never vested in him. He could acquire a lien by filing a bill in equity, while they already had one but needed equitable aid to enable them to enforce it. They could sell under execution and sue afterwards to clear the

N. Y. Rep.] Opinion of the Court, per VANN, J.

title, but he could not. The parties named had different rights as to the real estate, and were entitled to separate remedies. (*Gere v. Dibble*, 17 How. Pr. 31; *Bennett v. McGuire*, 58 Barb. 635.)

The final question is whether the complaint sets forth a cause of action, independent of the questions already passed upon. That question was considered by the Appellate Division upon an appeal from a judgment rendered for the defendants upon the merits before the complaint was amended. (*Ullman v. Cameron*, 92 App. Div. 91.) We adopt the language of the learned presiding justice, when, speaking for the court and referring to Charles E. Cameron, he said: "Now he was evidently entitled to the possession of such fund if he demanded it for the purpose of engaging 'in any business or enterprise;' and it seems to me that such a purpose is so broad and so personal to the beneficiary that it is equivalent to a direction that he is entitled to it whenever he asks for it."

The intention of the testatrix, as we glean it from the will, was to give the property to her husband and yet keep it from his creditors. The trust was an obvious pretext for that purpose. There was but a single trust, for the gift was of all the property to one person in trust for one person during his life with remainder over to others. The "uses and purposes" named as the object of the trust include the right of the beneficiary to take the corpus of the estate at will, by simply notifying the trustee that he wishes to engage in some business or enterprise. He is not obliged to actually engage in any business or enter upon some enterprise, but simply to say that he desires the property for either purpose, when the trustee has no discretion, but is required to pay over whatever is asked for, even to the extent of the whole fund. Although possession and title are thus subject to his control, it is insisted that until he calls for possession the property is not liable for his debts. The law will not endure this when creditors ask its aid to prevent it, but will declare the estate vested as to them as we did in *Wendt v. Walsh* (164 N. Y. 154).

Whether the trust should be sustained as to the persons named in the will, as distinguished from the creditors, need not now be passed upon. Unlike the case cited, which held the trust then under consideration to be a naked trust, in this case a trust term is defined and it may be that any property left at the death of the chief beneficiary will pass to the remaindermen and the intent of the testatrix thus carried out as far as possible. As to creditors, however, the trust cannot stand, for it is opposed to public policy as declared by statute and by the decisions of the courts. (1 R. S. 727; Real Prop. Law, §§ 71, 72, 73 and 129; *Hallett v. Thompson*, 5 Paige, 583; *Frazer v. Western*, 1 Barb. Ch. 220; *Wendt v. Walsh*, *supra*; Chaplin on Trusts, 585.)

In *Hallett v. Thompson*, Chancellor WALWORTH declared that it was "contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his creditors." That case was cited and the language of the chancellor substantially quoted with approval by Judge RAPALLO in *Williams v. Thorn* (70 N. Y. 270, 273), and it has received the approval of many courts in this state and elsewhere.

The doctrine is sound and applies to this case, for, as to my creditors, property is mine which becomes mine for the asking, and no words can make an instrument strong enough to hold it for me and keep it from them.

The order should be affirmed, with costs, and the questions certified answered in the negative.

CULLEN, Ch. J., HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur; GRAY, J., absent.

Order affirmed.

FREDERICK W. TIETZ, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.

NEGLIGENCE — STREET SURFACE RAILROAD OPERATED BY TROLLEY SYSTEM — WHEN RAILROAD COMPANY NOT LIABLE TO PASSENGER INJURED BY TROLLEY POLE WHILE PASSING ALONG RUNNING BOARD OF OPEN CAR. Where the road, tracks, poles and cars of a street surface railroad, operated by electricity by an overhead or trolley system, were in proper shape and condition and the trolley poles were located at such a distance from the tracks that they were unlikely to endanger passengers of normal size making the ordinary and customary use of the running boards of open cars, the railroad company is not liable for injuries sustained by a passenger of unusually large size from being struck by a trolley pole while he was attempting to pass along the running board of a moving car from the rear end to a seat nearer the front merely because the conductor, when told by the passenger that he intended to change his seat, assented thereto; a contention that the conductor was chargeable with knowledge of the position of the poles, the construction of the car, the size of the plaintiff and was, therefore, negligent in assenting to the act of the passenger, in leaving his place on the rear of the car to go in front without giving him some warning or intimation of the danger involved in such a movement is not tenable, where there is no evidence that the conductor knew that the passenger was not acquainted with the conditions surrounding him and it was entirely possible by the exercise of care for the passenger to have changed his seat as he desired by proceeding along the running board on the other side of the car or by waiting until the car was between two of the trolley poles, when he would incur no danger; and where there appears to have been nothing in the expression of his intention to make the change which would necessarily indicate to the conductor that he proposed to attempt it at the precise time when he did.

Tietz v. International Ry. Co., 107 App. Div. 620, reversed.

(Argued October 18, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 14, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles B. Sears for appellant. There is an entire absence of evidence of negligence on the part of the Niagara Falls

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.

Park and River Railroad Company, for which the defendant was liable. (*Craighead v. B. C. R. R. Co.*, 123 N. Y. 391; *Murphy v. N. A. R. R. Co.*, 6 Misc. Rep. 298; 149 N. Y. 609; *Moody v. S. S. Ry. Co.*, 182 Mass. 158; *Woodroffe v. R. C. H. & N. Ry. Co.*, 201 Penn. St. 521.) The plaintiff was guilty of contributory negligence. (*Coleman v. S. A. R. R. Co.*, 114 N. Y. 609.)

Philip A. Laing and *Hamilton Ward* for respondent. The railroad company, by its conductor, was bound to exercise care in an affirmative way to prevent injury to the plaintiff. (*Cattano v. M. S. R. Co.*, 173 N. Y. 565; *Koehne v. Q. C. R. R. Co.*, 32 App. Div. 419; 165 N. Y. 603; *Stierle v. U. R. Co.*, 156 N. Y. 70.) It was the duty of the conductor to warn the plaintiff. (*Brockway v. Lascala*, 1 Edm. Sel. Cas. 135; *Lent v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 467; *Wilder v. M. S. R. Co.*, 10 App. Div. 364; 161 N. Y. 665; *Ulume v. B. E. R. Co.*, 15 N. Y. S. R. 825; *Clark v. E. A. R. Co.*, 36 N. Y. 135; *Craven v. I. R. Co.*, 100 App. Div. 157; *Lucas v. M. S. R. Co.*, 56 App. Div. 405; *Gutens v. M. S. R. Co.*, 89 App. Div. 311; *Sheeron v. C. I. R. R. Co.*, 89 N. Y. 338; *Lansing v. C. I. R. R. Co.*, 16 App. Div. 146; *Graham v. M. R. Co.*, 149 N. Y. 336.) The plaintiff was not negligent. (*McIntyre v. N. Y. C. & H. R. R. Co.*, 37 N. Y. 287; *Clark v. E. A. R. R. Co.*, 36 N. Y. 135; 8 Hun, 494; 67 N. Y. 596; *Filer v. N. Y. C. & H. R. R. Co.*, 49 N. Y. 47; 59 N. Y. 351; *Maher v. C. P., N. & E. R. R. Co.*, 67 N. Y. 52; *Brainard v. N. E. R. R. Co.*, 44 App. Div. 613; *Gray v. M. S. R. Co.*, 39 App. Div. 536; *Nolan v. B. C. & N. R. R. Co.*, 57 N. Y. 63; *Gray v. R. C. & B. R. R. Co.*, 61 Hun, 212; *Still v. N. E. R. R. Co.*, 32 App. Div. 276; *Henderson v. N. E. R. R. Co.*, 46 App. Div. 280.)

WILLARD BARTLETT, J. This is an action to recover damages for personal injuries sustained by the plaintiff while a passenger upon an electric car operated by the Niagara Falls

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

Park and River Railway Company in the Dominion of Canada on September 10, 1899. The defendant is the successor in interest of that corporation and no question is raised as to its liability herein in case there is any liability at all. The accident out of which the action arose occurred while the plaintiff was endeavoring to change his seat in the car. For this purpose he stepped down upon the running board, and while there his body was brought into collision with one of the trolley poles between the tracks and he was thrown down and injured. The plaintiff was a large man, weighing two hundred and fifty pounds, and measuring twenty-four inches across the shoulders and twenty inches through the body. He had never before visited Niagara Falls, in the vicinity of which the accident occurred. Having crossed the arch bridge into Canada he took passage on the car, which was bound southward along the edge of the gorge. It was an open car with cross seats and one seat at the rear end facing backward. The plaintiff took this seat within a few feet of the place where the conductor stood. There were no other passengers on that portion of the car. When the car stopped at a place known as the Dufferin Café many of the passengers alighted and the plaintiff observed that the two rear seats in the body of the car were vacant. Thereupon he remarked to the conductor: "I see them two rear seats are empty. I will take one of those seats." To which the conductor responded, "Go and take it with pleasure," or as the plaintiff stated on cross-examination, "Take one with pleasure." Then, according to the plaintiff's testimony, he swung out to get into the other seat but came into contact with the trolley pole, the car being then running, according to his estimate, at a rate of from eight to ten miles an hour. Although there was evidence in behalf of the defendant to the effect that the conductor shouted, "Look out for the pole," the plaintiff testified that the conductor said nothing more than has already been stated and did not say anything about the trolley pole. The proof is that the distance between the so-called grab handles on the outside of the upright stanchions of the car and the trolley

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.]

pole was twenty-one inches, according to the evidence in behalf of the plaintiff, and twenty-two inches according to the evidence in behalf of the defendant. The plaintiff made the further statement that when he started to go out on the running board to change his seat the conductor was looking at him.

The case went to the jury solely on the question whether there was negligence on the part of the conductor in having either in his words or by his conduct assented to the act of the plaintiff in leaving his place on the rear of the car to go in front, without giving some warning or intimation of the danger involved in such a movement. The learned trial judge expressly ruled that the railroad company had the right to construct its tracks and poles in the way in which they were constructed and to run its cars in the manner in which they were run, and that the cars were in proper shape, the road was in proper shape, and the poles were in proper condition. The question presented by this appeal, therefore, is whether the conductor in charge of the car upon which the accident occurred was negligent either in giving the plaintiff a false assurance of safety or in failing to give him a proper warning.

In the case of a railroad company which is a common carrier of passengers it may be assumed that where a danger arises which is unknown to the passenger but which is known, or ought to be known, to the agents of the carrier charged with the management of the train, a duty exists on the part of those agents to warn the passenger of the danger or to take some other means to guard him against it. The present case, however, involves the question whether any duty to warn exists where all the conditions which constitute the danger are as observable by the passenger himself and apparently as obvious to him as they are known to the agents or servants of the common carrier. In the simple assent of the conductor to the proposal of the plaintiff to change his seat I am unable to perceive any assurance on the part of the conductor that it would be safe for the passenger to do so without the exercise of due care on his part in executing the necessary movement. The construction of the car and of the railroad line and the

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

position of the trolley poles and the size of his own body were just as patent to the plaintiff as they could have been to the conductor. It is true the plaintiff says he was sitting on the rear end looking at the American side and the scenery and did not notice the location of the trolley poles. We must also accept as true his statement that he had never been over the line before. These facts, however, could hardly have been known to the conductor. The learned counsel for the respondent insists that the conductor was chargeable with knowledge of the position of the poles, the construction of the car, the size of the plaintiff *and the fact that the plaintiff was ignorant of the conditions surrounding him*; but I can find nothing in the record which furnishes any basis for the assumption that the conductor knew that the plaintiff was not acquainted with these conditions. He certainly appears to have had the amplest opportunity to notice them. It was entirely possible by the exercise of care for the plaintiff to change his seat as he desired by proceeding along the running board on the other side of the car or by waiting until the car was between two of the trolley poles, when he would incur no danger; and there appears to have been nothing in the expression of his intention to make the change which would necessarily indicate to the conductor that he proposed to attempt it at the precise time when he did.

It seems to me quite clear that it would be going too far to hold the railway company responsible for the failure of a conductor to warn a passenger under the circumstances presented by this record. Although the duty to warn has frequently been asserted I have been unable to find any case with a single exception hereafter to be noted which lays down so stringent a rule against a common carrier as would be established by the affirmance of this judgment. No doubt there is an implied duty on the part of a railroad corporation engaged in the transportation of passengers to employ a competent conductor. (*Lambeth v. N. C. R. R. Co.*, 66 N. C. 494.) While a passenger may properly assume that a conductor knows whether he can under the particular circum-

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.]

stances get on or off or move upon the train with safety (*Filer v. New York Central R. R. Co.*, 59 N. Y. 351), yet where it is plainly open to his observation that reliance upon the judgment of those placed in charge of a train will expose him to risk that a reasonably prudent man will not assume, the passenger is not justified in assuming the risk. (*Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26.) The cases in which negligence has been imputed to a railroad company for the failure of those in charge of the train to give proper warning to the passengers have been cases in which the passengers were ignorant of the conditions which constituted the danger to which they were exposed. Thus, a typical case is *Gonzales v. N. Y. & Harlem R. R. Co.* (39 How. Pr. 407), where the plaintiff's intestate was killed on the defendant's railroad immediately after leaving the car of an accommodation train on which he was a passenger, being run down by an express train coming in the opposite direction upon a track on the west side of the train which he had just left; and this court held that it was the duty of the conductor and engineer to see that the passengers should be prevented from leaving the train on the west side, "or at least to give them notice of the approaching train and to request them either to sit still until that train had passed or to leave the train on the east side," and that the omission to do so constituted negligence.

None of the authorities cited in the brief for the respondent in support of the proposition that it was the duty of the conductor to warn the plaintiff seems to me to support his contention in that respect. I have carefully examined them all and deem them readily distinguishable in principle from the case at bar. *Lent v. N. Y. C. & H. R. R. Co.* (120 N. Y. 467) was a case of assurance of safety to the passengers to proceed from one car to another, and invitation to do so, based on the fact that the conductor had called out "all aboard." In *Wilder v. Metropolitan St. Ry. Co.* (10 App. Div. 364; affd., 161 N. Y. 665) a passenger was thrown from her seat in one of the defendant's cars when it was passing over a sharp curve. The court said: "If warning to the passengers

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

in the car was reasonably necessary for their protection or safety it was the duty of the defendant to give them the benefit of it." I cannot see how this proposition as applied to the circumstances of that case has any bearing upon the question presented here. In *Clune v. Brooklyn Elevated R. R. Co.* (15 N. Y. S. R. 825) the plaintiff attempted to step from one car to another. Their platforms were in contact when the train was still, but pulled apart when the train was started, and the plaintiff fell into the opening. The General Term of the second department held that the conductor, if he heard the proposal of the plaintiff to cross, owed her the duty to warn her of the danger. This was on the assumption that the danger was unknown to the plaintiff. *Clark v. Eighth Ave. R. R. Co.* (36 N. Y. 135) merely holds that an invitation to ride on the platform of a street car, and an assurance that it is a safe and suitable place, may be implied from the fact that the car and platform were full of passengers, without room for more, and that the conductor called for and received the fare from the plaintiff. These facts have no resemblance to those in the case at bar. In *Craven v. International Ry. Co.* (100 App. Div. 157) a passenger who had just alighted from a car for the purpose of making a transfer was struck and injured by another car. She had been invited or directed to make her transfer where she did. This was held by the Appellate Division of the fourth department to be "somewhat of an assurance that she would have an opportunity to make such transfer in safety." The only proposition in *Lucas v. Metropolitan St. Ry. Co.* (56 App. Div. 405) which relates in any manner to the duty to warn passengers is contained in these words in the opinion: "When it (defendant) was about to run its car around the curve at the speed set out in the record, it owed the plaintiff a duty of informing him of that fact, or indicating to him in some way that he must exercise at that point increased care for his own safety." *Gatens v. Metropolitan St. Ry. Co.* (89 App. Div. 311) merely emphasizes the duty to warn a passenger on a car platform of the danger to be apprehended in approaching an unknown curve

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 188.

in the road. The opinion in *Sheeron v. Coney Island & Brooklyn R. R. Co.* (89 App. Div. 338) does not indicate that any question whatever of assurance or warning was involved in that case. The same is true of *Lansing v. Coney Island & B. R. R. Co.* (16 App. Div. 146). In *Graham v. Manhattan R. Co.* (149 N. Y. 336), where the plaintiff was injured while a passenger upon a platform of one of the defendant's cars, it was said by MARTIN, J.: "Even if the plaintiff assumed the ordinary risk which attended riding upon the platform, he had a right to assume that the defendant's servants would cause no unusual disturbance of the crowd and that the cars were so constructed as not to render his position dangerous from their proximity to each other in passing over any portion of the road, or at least if such danger existed that he would be apprised of it." This decision simply asserts the obligation to warn against a danger unknown to the passenger. There was no question of failure to warn the passenger of danger in *Gray v. Metropolitan St. R. Co.* (39 App. Div. 536). Although he stood with but one foot on the platform, the plaintiff was deemed to be a passenger "by the express invitation or acquiescence of the defendant's employees" because the conductor had taken up his transfer ticket. In *Henderson v. Nassau Electric R. R. Co.* (46 App. Div. 280) the plaintiff, seeking passage in an open car of the defendant, which was crowded, was moving along the running board in search of a seat when he was struck by a van which the motorman had previously signaled to get out of the way and which had stopped within about two feet of the track. It was held that the defendant was chargeable with notice that the distance was insufficient for persons upon the running board to escape contact with the van unless they observed it and bent their bodies inward toward the car. *Lehr v. Steinway & H. P. R. R. Co.* (118 N. Y. 556) was a case in which the plaintiff, after procuring a seat for his wife in one of the defendant's cars, claimed that he had been compelled to ride on the step of the front platform by reason of the crowded condition of the car. He was thrown

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

off by a movement of the passengers on the platform. It was held that the question of the defendant's negligence and the plaintiff's contributory negligence were properly submitted to the jury. The case of *Gleason v. Metropolitan St. R. Co.* (99 App. Div. 209) turned on the exclusion of evidence tending to prove the existence of a custom to receive passengers at a particular place, and is not perceived to bear any possible relation to the questions involved here. The case of *Kohm v. Interborough Rapid Transit Co.* (104 App. Div. 237) related to an injury attributed to the overcrowding of one of the defendant's cars. No reference is made in the opinion to any liability predicated upon a failure to warn the injured passenger.

The single case which tends to uphold the position of the respondent is *West Chicago Street R. R. Co. v. Marks* (182 Ill. 15). There it appeared that the defendant corporation operated open cars, along each side of which were running boards which, though designed as steps, were nevertheless often used by passengers to stand upon, sometimes when there was no room elsewhere in the car, and sometimes from choice. The plaintiff on boarding the car found all the seats occupied, as well as the aisles between the seats, and also the running board on the right-hand side of the car. He, therefore, in company with other passengers, got upon the left-hand running board. While in this position the car passed a viaduct which was between twelve and fourteen inches distant from the car. The plaintiff knew nothing about this structure, and was not warned of it by the defendant or any one else. There was no danger in riding on the footboard to one who knew of the existence and nearness of the viaduct, as it could have been avoided by standing close to the car. Upon these facts a judgment upon a verdict in favor of the plaintiff was affirmed by the Supreme Court of Illinois, which held that negligence could be imputed to the defendant corporation in running its cars so near to a fixed structure without warning the passengers who were in a position to sustain injury if not duly cautioned.

The distinction between this Illinois case and the case at bar lies in the fact that the viaduct there in proximity to the railroad was no part of the railroad line, and was so close to the track that persons riding on the running board were obliged to take special care to avoid contact with it, while here the distance between the trolley poles and the car was shown by uncontradicted evidence to be great enough to enable persons ordinarily to stand upon or pass along the running board in safety, and the trial court expressly negatived the idea that any negligence could be predicated upon the manner in which the railroad was constructed and maintained. Indeed, there was no evidence that the construction of the railroad here was unusual, or that the distance between the running boards of the car and the trolley poles was such as was likely to endanger passengers making the ordinary and customary use of such running boards, or that the manner in which the road was built and maintained was in any respect such as to render the railroad company chargeable with negligence in the maintenance of the various structures making up the line as they existed at the time of the accident. This court said in *Craighead v. Brooklyn City R. R. Co.* (123 N. Y. 391), where the defendant's cars passed one another at a distance of seventeen inches: "The defendant was not bound to so construct its tracks that it would be impossible for a passenger to be struck by another car while he was standing on the outside of an open one."

I concede the correctness of the general proposition that if the company had created a danger it was its duty to warn its passengers against that danger, but under the charge of the trial judge and upon the theory on which the case was submitted to the jury the appellant had not created any danger in the proper sense of that term. Doubtless the presence of trolley poles is dangerous to any one riding on a car who may come in contact with them. So, also, there are dangers in the operation of every steam railroad, but these dangers are inherent in the operation of the roads and do not fall within the rule I have stated. If there was anything exceptional in

the proximity to the track of the trolley poles or any other obstruction it would have been the duty of the conductor to warn the plaintiff of its existence, but I cannot see that it was his duty to warn the passenger of a danger which is merely an ordinary incident of such railroad travel. This is the crux of this case and the sole question that was submitted to the jury. Take the case of the trolley roads which run under the elevated railroads in the city of New York. It cannot be that it is the duty of the conductor to warn every passenger of the presence of the pillars of the elevated railroad, nor can he be expected for this purpose to distinguish between residents of the city accustomed to travel on the road and passengers who are strangers. In *Murphy v. Ninth Ave. R. R. Co.* (6 Misc. Rep. 298 ; affd., 149 N. Y. 609) the plaintiff while moving from the rear toward the front of the defendant's open car on the step which ran along the westerly side collided with an elevated railroad column and was thereby knocked off the car. The distance between the stanchion of the car and the nearest part of the column was fifteen inches. It appeared that he could have changed his position by proceeding along the easterly side of the car where there were no columns to interfere with his movements, and it was held that the injury to the plaintiff, if due to any negligence, was due to his own rather than that of the defendant.

I think this judgment should be reversed and a new trial granted, costs to abide event.

VANN, J. (dissenting). The plaintiff was a passenger and entitled to the high degree of care to which that relation to the defendant gave him the right by law. He was a stranger to the locality, the railway and its surroundings. He had never seen Niagara Falls before and had taken passage in an observation car of unusual size, used in a national park to enable strangers from all over the world to see the wonderful scenery. He did not pay for transportation simply, as the main object was the privilege of sight-seeing. The management must be presumed to have known that the eyes of its

passengers were not fixed upon objects near the track and away from the river, but on the grandeur of the view which they were invited to enjoy. The want of care by either party to the action should be considered in the light of that fact. The evidence, *me judice*, warranted the inference drawn by the jury that the defendant was negligent and the plaintiff free from negligence.

What are the facts? The plaintiff was on the Canadian side looking across the river at the scenery on the American side. He was of such huge size that it was obvious at a glance that he could not pass through the narrow space between the car and the trolley pole at the place where the accident occurred without the utmost danger. The double tracks converged somewhat at this point only, which was known to the defendant and the conductor, its agent in charge of the car, but not to the plaintiff. The trolley poles are between the tracks, except for a space of several hundred feet which includes the place of the accident, where they come together and interlock. In the language of the engineer who made the measurements "the easterly rail of the west track crosses the westerly rail of the easterly track," and at this point the trolley poles, which elsewhere are between the tracks, are on the side farthest from the river. The plaintiff gave notice of his intention to pass through said narrow place, which involved a danger known to the conductor but unknown to himself, for the jury could find that it was not obvious even to a vigilant passenger on his first trip over the road. The situation was dangerous at one particular point which he had never seen, though safe over the rest of the road. There was no notice to warn passengers, nor safeguard to protect them. The conductor told the plaintiff to go, and, as he went, kept looking at him. He saw him enter upon the perilous passage, but gave no warning. Knowing the danger to one for whose safety the law commanded him to exercise the highest degree of care, he exercised no care, but let him go on to ruin without lifting his voice to prevent. He was the son of the superintendent of the road and but seventeen or eighteen

years of age. What he failed to do, the defendant failed to do and his omission was negligence on its part, as the jury properly found.

The plaintiff exercised some care, for he notified the conductor of what he was going to do and was told to do it. The circumstances made this an assurance of safety, upon which he had a right to rely. Why did he speak to the conductor except to learn whether it was safe to then and there change his seat, and why did the conductor tell him to go and take the other seat unless he intended to assure him it was safe to do so? What was the running board for, if not for the use of passengers? What he did was not dangerous except under the peculiar facts of which he was ignorant, but which the conductor knew or should have known. People were permitted to stand on the running board at all other points on the road and to ride thereon at will.

Is it negligence, as matter of law, for a passenger to do what the conductor tells him to, especially when he looks at him in silence while he does it? Could not the jury find from the evidence that the plaintiff, under the circumstances, was not bound at the peril of his life to observe the precise situation of a single trolley pole with reference to the track and to measure with exactness its distance from the moving car at one particular point, differing from all others, when he had paid the defendant for the privilege of witnessing from an observation car a grand sight, in the opposite direction from the pole and had received from its conductor an assurance of safety? The situation and surrounding circumstances, what the conductor said and did and the right of the plaintiff to rely thereon, were some evidence on the question of contributory negligence, which, therefore, was for the jury. I do not quarrel with the law of my learned brother who has written so ably for the court, but I deny that it applies to this case and invoke the principle that it is the duty of common carriers to warn their passengers of a danger of their own creation, which, while it could be seen, the passenger was not bound by law to see after an assurance of safety had

been given by the conductor in charge. The rule of "utmost care" made for the protection of passengers should not be relaxed, for the safety of the citizen is the highest concern of the state.

I vote for affirmance.

CULLEN, CH. J., HAIGHT and WERNER, JJ., concur with WILLARD BARTLETT, J.; VANN, J., reads dissenting opinion; HISCOCK, J., not sitting; GRAY, J., absent.

Judgment reversed, etc.

THE AMERICAN GUILD OF RICHMOND, VIRGINIA, Respondent,
v. PHEBE D. DAMON et al., Appellants.

1. APPEAL — EFFECT OF ORDER OF APPELLATE DIVISION REVERSING JUDGMENT ON QUESTIONS OF LAW ONLY. Where the unanimous order of the Appellate Division, reversing a judgment rendered at Special Term on questions of law only, affirmatively declares that the facts have been examined and no error found therein, the facts found by the trial court are conclusive on the Court of Appeals and the only question that can be determined by the latter court is whether those facts justified or required a reversal of the judgment rendered thereon by the Special Term.

2. PLEADING — WHEN FAILURE TO REPLY DOES NOT PRECLUDE PLAINTIFF FROM CONTESTING COUNTERCLAIM. A plaintiff is not precluded from contesting a counterclaim by a failure to serve a reply unless the counterclaim is distinctly named and pleaded as such in the answer.

3. APPEAL — WHEN ORDER OF REVERSAL ERRONEOUSLY GRANTS NEW TRIAL INSTEAD OF MODIFYING JUDGMENT. Where a judgment in an action to foreclose a mortgage is properly reversed by the Appellate Division on the ground that the Special Term had erroneously awarded a recovery against the plaintiff for the excess of the sum due on a claim, set up by one of the defendants as a defense and set-off, over that due on the bond and mortgage, and it appears that it is not possible on another trial to vary the proof as to the liability of the plaintiff, a new trial should not be ordered, but the judgment merely modified, unless as a matter of law the claim of the defendant was not a valid set-off to the bond and mortgage.

4. FORECLOSURE OF MORTGAGE BY ASSIGNEE THEREOF — WHEN ONE OF TWO DEFENDANTS MAY SET OFF COUNTERCLAIM AGAINST PLAINTIFF'S ASSIGNOR — WHEN PLAINTIFF'S CLAIM EXTINGUISHED THEREBY. Under the provisions of the Code of Civil Procedure (§§ 502, 1909) the assignment of a mortgage is subject not only to every defense, but to

N. Y. Rep.]

Statement of case.

every counterclaim which might have been set up against the assignor; and in an action brought by an assignee to foreclose a mortgage executed by a husband and wife to secure the payment of a joint and several bond executed and delivered to the mortgagee at the same time, and to recover a money judgment against each defendant for any deficiency that might arise on the sale of the mortgaged property, the husband may, under section 501 of the Code of Civil Procedure, counterclaim and set off a claim existing in his own favor against plaintiff's assignor, and the allowance thereof inures to the benefit of both defendants; and where the claim is equal to or greater than the amount due on the bond and mortgage, it extinguishes the liability of both defendants and operates as a discharge of both instruments; the fact that the action is in form joint does not affect the principle involved.

American Guild v. Damon, 107 App. Div. 140, reversed.

(Argued October 17, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 25, 1905, reversing a judgment in favor of defendants entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Louis J. Bedell, *William Kennedy* and *Nelson L. Lansing* for appellants. The certificates are valid obligations for their face value. (Harriman on Contracts [2d ed.], § 259; *Topliff v. Topliff*, 122 U. S. 121; *Wadsworth v. Tradesman Co.*, 132 N. Y. 540; *First Nat. Bank of Springfield v. Dana*, 79 N. Y. 116.) The certificates being pleaded as an absolute covenant and promise to pay \$600 and \$1,000 respectively, and the prayer being that they be adjudged a set-off and counterclaim and for such other and further relief as may be just and equitable in the premises, constitute a good counterclaim, and no reply having been served, the same is admitted for all the purposes of this action. (Code Civ. Pro. § 522; *McCrea v. Hopper*, 35 App. Div. 572; 165 N. Y. 633; *Teets v. Throckmorton*, 8 N. Y. S. R. 897; *M. Trust Co. v. T. R. R. Co.*, 18 Abb. [N. C.] 368; 106 N. Y. 673; *Fleish-*

man v. Stern, 90 N. Y. 115.) The bond being a joint and several obligation with the mortgage as collateral, either of the appellants could pay and satisfy the same, and the respondent having asked for a deficiency judgment against J. H. Damon he is entitled to counterclaim. (*Hunt v. Chapman*, 51 N. Y. 557; *Briggs v. Briggs*, 20 Barb. 447; *Bathgate v. Haskins*, 59 N. Y. 533.)

Wallace Thayer for respondent. The certificates for \$600 and \$1,000 respectively having been set up in the defendants' answer as defenses and not as counterclaims, and the defendants having demanded no affirmative relief on account thereof, the plaintiff was not obliged to interpose a reply in order to raise an issue as to their validity. (*Acer v. Hodykiss*, 97 N. Y. 395; *E. L. Assur. Society v. Cuyler*, 75 N. Y. 511; *Favilla v. Moretti*, 13 N. Y. 707; *Bates v. Rosekrans*, 37 N. Y. 409; *Kasper v. Chamberlain*, 38 N. Y. S. R. 476; *N. Y. L. Ins. Co. v. Atkins*, 125 N. Y. 661; *Wood v. Gordon*, 38 N. Y. S. R. 455; *Avery v. N. Y. C. R. R. Co.*, 24 N. Y. S. R. 918; *Burke v. Thorn*, 44 Barb. 363; *Deering v. City*, 51 App. Div. 402.) These certificates were owned by the defendant Joseph H. Damon alone. The defendant Phebe D. Damon had no right, title or interest in them. If they were a defense against the bond and mortgage in favor of the defendant Joseph H. Damon, they would be no defense against the defendant Phebe D. Damon. By the decision the bond and mortgage are canceled as against both defendants. A counterclaim or defense in favor of one defendant cannot be interposed successfully to defend a claim against the property of another. (2 Abb. Ency. Dig. 1083.) Under no circumstances could the defendants have a valid affirmative judgment against the plaintiff. (Code Civ. Pro. § 502.)

CULLEN, Ch. J. The action is brought by the plaintiff, a Virginia corporation, as the assignee of the Safety Fund Insurance Society, a New York corporation, to foreclose a mortgage executed by the two appellants, husband and wife, to said last named corporation to secure the payment of a joint

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

and several bond executed and delivered to the same party at the same time. The defendants pleaded as a defense and set-off a claim held by the defendant Joseph Damon against the plaintiff's assignor on two participation certificates issued by that corporation, the nature of which certificates is not material to this discussion. On the trial it appeared that the plaintiff and its assignor had entered into what is called a consolidation agreement by which the plaintiff was to acquire all the assets of its assignor and to administer those assets in discharge of its assignor's obligation, but the debts of the assignor were in no degree to be assumed by the plaintiff. The Special Term found the maturity of the participation certificates before the assignment of the mortgage in suit to the plaintiff and the liability thereon of the plaintiff's assignor to the defendant Joseph. It made a decree in favor of the defendants canceling the bond and mortgage and awarding them judgment against the plaintiff for the excess of the amount due on the certificates over that due on the bond and mortgage. The Appellate Division reversed this judgment and ordered a new trial. The unanimous order entered upon this decision reversed the judgment on questions of law only, and affirmatively declared in the body of the order that the facts had been examined and no error found therein. From the order of the Appellate Division the defendants have appealed to this court, giving the requisite stipulation.

Under the form of the order of the Appellate Division the facts found by the trial court are conclusive on this court. The only question before us is whether those facts justified or required a reversal of the judgment rendered thereon by the Special Term. That the plaintiff, under its agreement with its assignor, was not liable personally for the debts of the latter corporation is entirely clear. Therefore, the Appellate Division was doubtless correct in reversing so much of the judgment as awarded a recovery against the plaintiff for the excess of the sum due on the certificates over that due on the bond and mortgage, unless, as the appellants' counsel contends, the plaintiff was foreclosed by its failure to serve a reply to the defendants'

answer. This position of counsel cannot be upheld. In the answer the certificates are pleaded as a set-off and defense, and in the prayer for judgment, where the only mention of counterclaim is found, it is asked that they be allowed as a counterclaim, defense and set-off, and that the bond and mortgage be canceled. No recovery against the plaintiff for the amount of the certificate is asked. It is the settled law in this state that for a defendant to preclude a plaintiff from contesting a counterclaim because of a failure to serve a reply, the counterclaim must be distinctly named as such in the answer. (*Acer v. Hotchkiss*, 97 N. Y. 395; *Equitable Life Assurance Society v. Cuyler*, 75 id. 511.) But though the judgment was properly reversed in this respect, it not being possible on another trial to vary the proof as to the liability of the plaintiff, a new trial should not have been ordered, but the judgment merely modified, unless as a matter of law the certificates were not a valid set-off to the bond and mortgage. (*Freel v. County of Queens*, 154 N. Y. 661; *Heerwagen v. Crosstown Street Ry. Co.*, 179 id. 99.)

This brings us to the principal question in the case, which is, whether the claim on the certificates which was held by only one of the defendants was a good set-off against the plaintiff's claim. Under sections 502 and 1909 of the Code of Civil Procedure the assignment to the plaintiff was subject not only to every defense but to every counterclaim that might be set up against its assignor. Therefore, the question presented here is the same as that which would arise had the action been brought by the original mortgagee, and may be examined and considered from that point of view. At common law and under the Revised Statutes in an action against more than one defendant there could be interposed only a set-off due to all the defendants jointly. (2 R. S. p. 354, sec. 18.) That rule still obtains in this state, where the suit is on the joint obligation or liability of the defendants. Where, however, the liability of the defendants is several, under the express provisions of section 501 of the present Code, which in this respect is but a re-enactment of section

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

150 of the former Code, as amended in 1852, a defendant against whom a several judgment may be rendered can interpose a counterclaim existing in his own favor. In *Parsons v. Nash* (8 How. Pr. 454), which was an action against the maker and sureties on a promissory note, it was held that as a several judgment might be rendered against either defendant, each could plead a counterclaim held by himself. In *Briggs v. Briggs* (20 Barb. 477) it was held that in an action against several defendants jointly and severally liable, either of them might set off individual debts due to him by the plaintiff or might avail himself thereof by way of counterclaim. (See, also, *Newell v. Salmons*, 22 Barb. 644.) The authority of these earlier decisions has never been impugned, and *Newell v. Salmons* is cited with approval in *Bathgate v. Haskin* (59 N. Y. 533). In the present case, as already said, the bond of the defendants is joint and several, and, therefore, a several judgment could have been had against either defendant. The fact that the action was in form joint does not affect the principle involved. When the defendants "In an action are *jointly and severally* liable, although sued jointly, a counterclaim, consisting of a demand in favor of one or some of them, may, if otherwise without objection, be interposed." (Pomeroy's Remedies and Remedial Rights, sec. 761; *Dunn v. West*, 5 R. Monroe, 376, 381.) Therefore, had the defendants been sued on the bond in an action at law the defendant Joseph could, under the authorities and the rule obtaining in this state, have interposed as a counterclaim the amount due him on the participation certificates. In such case it is plain that the counterclaim so interposed would necessarily have inured to the benefit of all the defendants. The plaintiff had but one claim and but one cause of action. Payment by a stranger to the obligation would not discharge it, but payment by anybody liable thereon, whether jointly or severally, would necessarily satisfy it. (*Cockcroft v. Muller*, 71 N. Y. 367.) Any other rule would permit a creditor to recover his claim as many times over as he had parties severally liable for the debt. We are

not considering a case where the creditor has released one of his debtors, either without consideration or for less than the debt, reserving his right to proceed against the others. Such settlements are authorized by our statutes. But where a debt has been paid in full by one debtor, it is satisfied as to all. (*Coonley v. Wood*, 36 Hun, 559.) The same rule must obtain in the case of a counterclaim as in that of payment. It is in fact a payment by the set-off of an outstanding claim against the creditor. Had the bond not been assigned and the plaintiff's assignor brought an action upon it, the defendant Joseph interposing his counterclaim, the judgment in the action would extinguish *pro tanto* the claim of that defendant against the plaintiff. If it were allowed to recover against the other defendant it would be recovering twice over; first by the extinguishment of its debt, and second by the amount recovered against the other defendant. Whenever in a suit on a money obligation a counterclaim is allowed in favor of one of several defendants it must, from the nature of the case, necessarily inure to the benefit of all the defendants liable on that obligation. A several defendant need not interpose such a counterclaim and give his co-defendants the benefit thereof; but whether he shall do so or not is solely his concern.

It is urged that the plaintiff might have proceeded against the other defendant, the wife, alone, in which case the counterclaim would be inadmissible. We may assume that this position is correct, but the plaintiff must take the consequences of the form of action it has elected to bring. The case is not singular. Where a creditor sues the principal debtor and surety in the same action, either can interpose a counterclaim which inures in favor of both. If, however, he sues the surety separately the surety cannot interpose a counterclaim in favor of his principal (*Gillespie v. Torrance*, 25 N. Y. 306), though if the principal be insolvent the surety may have relief in equity. The form of the action brought by the creditor may, therefore, substantially affect his rights, but that is a matter for him to consider.

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

We think that the rule which would apply in the case of a common-law action on the bond controls the disposition of the present action, which is not only to foreclose the mortgage, but to recover a money judgment against each defendant for any deficiency that may arise on the sale of the mortgaged property. It was said in *National Fire Insurance Company v. McKay* (21 N. Y. 191) by Chief Judge COMSTOCK: "In a foreclosure suit a defendant who is personally liable for the debt, or whose land is bound by the lien, may probably introduce a set-off to reduce or extinguish the claim." In that case the remark of the learned judge was obiter, but in *Hunt v. Chapman* (51 N. Y. 555) the proposition was decided. *Bathgate v. Haskin* (59 N. Y. 534) is to the same effect, though much of the discussion in that case is not germane to this. There the bond to the plaintiff was the joint bond of the owner of the mortgaged premises and another person, and to bring the case within the general rule it was necessary to show that the co-obligor was merely a surety. On the trial of this action the plaintiff put in evidence a deed to the defendant Phebe tending to prove that the title to the mortgaged premises was solely in her. We do not see that this fact affects the question before us. There is nothing in the case to show that the loan was not made to both defendants, and on the face of the bond and mortgage the debt appears to be that of both. However that may be, the plaintiff has sought to recover on a personal claim against the defendant Joseph and by seeking such relief it subjected its whole cause of action to any valid counterclaim that Joseph might have.

We are of the opinion that the counterclaim in favor of the husband extinguished the liability on the bond and mortgage, and that both instruments were properly held by the trial court to be discharged. The Appellate Division, therefore, instead of ordering a new trial, should have modified the judgment by striking out the recovery against the plaintiff of the excess due on the certificates.

The order of the Appellate Division should be reversed

and the judgment of the Special Term modified so as to strike out the award of a money judgment against the plaintiff, except for costs, and as thus modified affirmed, without costs to either party in this court or in the Appellate Division.

HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur; GRAY, J., absent; HISCOCK, J., not sitting.

Ordered accordingly.

MYER BACH et al., Respondents, v. DAVID KIDANSKY et al.,
Appellants.

REAL PROPERTY — VENDOR'S LIEN — PROPERTY CONTRACTED TO BE SOLD SUBJECT TO MORTGAGES FOR CERTAIN AMOUNT BUT CONVEYED SUBJECT TO MORTGAGES FOR LESS AMOUNT — WHEN VENDOR'S LIEN MAY BE ENFORCED FOR DIFFERENCE IN AMOUNT. The facts examined in an equitable action to establish a vendor's lien on real estate in which the issue was whether or not such a lien was created, where the vendees had contracted to take the property for a certain sum in cash and subject to four mortgages, one of which, the third, was secured by a collateral mortgage on other property owned by the vendors: it being provided by such third mortgage that when the property covered by it was sold, \$3,000 should become due thereon, and that when \$4,000 was paid thereon the collateral mortgage should be discharged, and at the time of closing title the assignee of such third mortgage, who was the wife of one of the vendees, refused to accept on such mortgage the sum of \$3,000 from the vendees and the sum of \$1,000 from the vendors and subrogate them to the extent of \$1,000 in such mortgage; whereupon the vendors, who had contracted to sell the property covered by the collateral mortgage free and clear from incumbrances, paid such assignee the sum of \$1,000, in consideration of which she released and canceled the collateral mortgage, the result being that the vendees paid in cash and by the assumption of mortgages \$1,000 less than they agreed to pay for the premises. *Held*, that the payment of said \$1,000 by the vendors to obtain a discharge of the collateral mortgage is to be considered in law as a part of the purchase money, and the vendees having refused to pay the same on closing title, a vendor's lien was at once impressed on the premises.

Bach v. Kidansky, 106 App. Div. 502, affirmed.

(Argued October 26, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July

13, 1905, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Manfred W. Ehrich for appellants. As no part of the purchase money remains unpaid the plaintiffs are not entitled to a vendor's lien. (*McKillip v. McKillip*, 8 Barb. 552; *Camp v. Gifford*, 67 Barb. 434; 4 Kent's Comm. [12th ed.] 152; Story's Eq. Juris. [13th ed.] §§ 1218-1232; Sugden on Vendors [8th Am. ed.], 671; *Hare v. Van Dusen*, 32 Barb. 92; *Bradley v. Bosley*, 1 Barb. Ch. 125; *Maroney v. Boyle*, 141 N. Y. 462; *Hubbell v. Henrickson*, 175 N. Y. 175; *Seymour v. McKinstrey*, 106 N. Y. 230; *Walrath v. Abbott*, 75 Hun, 445.) The plaintiffs, by conveying the property upon payment of \$8,000, waived whatever rights they might at that time have asserted to the payment of any additional sum as purchase money. (*Gerhardt v. Sparling*, 49 Hun, 1; *Howes v. Barker*, 3 Johns. 506; *Houghtaling v. Lewis*, 10 Johns. 297; *Williams v. Hathaway*, 19 Pick. 367; *Crotzer v. Russell*, 9 S. & R. 78; *Stebbins v. Eddy*, 4 Mason, 414.)

Edward W. S. Johnston for respondents. The plaintiffs clearly have a vendor's lien on this property in question for the \$1,000 unpaid portion of the purchase price of the premises. (*Lucas v. Wade*, 31 So. Rep. 231; *McWhorter v. Stewart*, 39 App. Div. 214; *B. S. Bank v. B. T. Co.*, 85 Hun, 75; *White v. Taylor*, 52 S. W. Rep. 820; *Maroney v. Boyle*, 141 N. Y. 467; *Garson v. Green*, 1 Johns. Ch. 308; *Bradley v. Bosley*, 1 Barb. Ch. 125; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Auburn v. Settle*, 3 T. & C. 258; *Koch v. Roth*, 37 N. E. Rep. 317.) The respondents did not, by conveying this property and accepting the \$6,500 called for by the contract to be paid by the appellants at the time of closing title, waive their right either to the payment of the \$1,000 balance or to a lien therefor against the property so

Opinion of the Court, per EDWARD T. BARTLETT, J. [Vol. 186.

conveyed by them. (*Purdy v. Coar*, 109 N. Y. 448; *Bankhead v. Owen*, 60 Ala. 457; *B. S. Bank v. B. T. Co.*, 85 Hun, 75; *Koch v. Roth*, 37 N. E. Rep. 320; *Seymour v. McKinstry*, 106 N. Y. 230; *Wilson v. Lyon*, 5 Ill. 166; *Coles v. Withers*, 33 Gratt. 186; *Selna v. Selna*, 58 Pac. Rep. 17; *Camp v. Gifford*, 67 Barb. 434; *Dubois v. Hull*, 43 Barb. 26; *Fenter v. McKinstry*, 91 Ill. App. 255.) The plaintiffs had no right of subrogation to the amount of \$1,000 in this \$13,000 mortgage, and if they had it such a right is not exclusive and they also have their right to a vendors' lien. (*Koehler v. Hughes*, 148 N. Y. 507; *Koch v. Roth*, 37 N. E. Rep. 320; *Auburn v. Settle*, 3 T. & C. 258; *Pleasants v. Fay*, 13 App. Div. 237.)

EDWARD T. BARTLETT, J. This is an action in equity to establish a vendor's lien upon real estate for unpaid purchase money. The plaintiffs agreed to sell to the defendants, and the latter agreed to purchase, improved real estate in the city of New York, known as 321, 323 and 325 Madison street for \$101,000. The contract was reduced to writing and duly executed. The terms of payment were \$1,500 in cash at time of executing the contract; \$6,500 in cash on delivery of the deed, and \$93,000 by taking deed of premises subject to four mortgages aggregating that amount, each covering all or a portion of said premises. One of these was a third mortgage of \$13,000, covering entire premises, secured by a collateral mortgage of like amount on 185 and 187 Allen street in the city of New York. There was a covenant in the \$13,000 mortgage that in case of sale of the mortgaged premises, \$3,000 of principal was to become immediately due and payable. The present litigation is due to the transactions relating to this mortgage.

The order from which this appeal is taken states that the reversal is on the law and the facts, but an examination of the record shows that no material fact is in dispute; in view of the uncontradicted testimony and the admissions in the answer, there were presented to the Appellate Division ques-

N. Y. Rep.] Opinion of the Court, per EDWARD T. BARTLETT, J.

tions of law only, upon undisputed facts, as was stated in the opinion of that learned court.

After the execution of the contract and prior to the law day, the \$13,000 mortgage was purchased by Flora Levy, the wife of the defendant Louis J. Levy. It appears that the collateral mortgage on the Allen street property, to which reference has already been made, contained a provision that when \$4,000 should have been paid on the principal mortgage covering the Madison street property, the collateral mortgage should be satisfied. The plaintiffs had after the execution of the contract with defendants agreed to sell the Allen street property to Weil and Mayer free and clear of all incumbrances.

At the time fixed for the closing of the title, November 30th, 1903, an adjournment was taken to December 1st, 1903, the fact having become known that Flora Levy had purchased the \$13,000 mortgage and the collateral mortgage on the Allen street property. It was also agreed that the defendants' counsel should notify Flora Levy to be present at the time and place for closing the title, in order that the plaintiffs might pay to her either the sum of \$4,000 or that the defendants should pay to her the sum of \$3,000 and the plaintiffs the sum of \$1,000, so as to comply with the conditions of said mortgages, and to obtain a cancellation of the collateral mortgage on the Allen street property. On the 1st of December, 1903, at the time for closing title, Flora Levy did not attend, and on her behalf her husband, the defendant Louis J. Levy, refused to accept the sum of \$3,000 from the defendants and the sum of \$1,000 from the plaintiffs, with interest, and execute a satisfaction or release of the Allen street mortgage, and also execute a writing produced by plaintiffs' counsel, subrogating the plaintiffs to an interest of \$1,000 in the said \$13,000 mortgage. Thereupon the plaintiffs paid to Flora Levy the sum of \$1,000 on said mortgage, and she released and canceled the collateral mortgage on the Allen street property.

The plaintiffs, upon receiving the final cash payment of \$6,500, delivered to the defendants a conveyance of the prop-

Opinion of the Court, per EDWARD T. BARTLETT, J. [Vol. 186.]

erty, having, as matter of fact, received from them only the sum of \$100,000, instead of \$101,000 they had covenanted to pay.

On these undisputed facts plaintiffs insist that the sum of one thousand dollars so paid by them to Flora Levy was under compulsion in order to secure the closing of the sale of the Madison street property and clear the title of the Allen street property from the lien of the collateral mortgage, the plaintiffs having contracted to convey the same to Weil and Mayer free and clear.

The transaction at the time of closing the title is thus stated by one of the attorneys for the plaintiff on the witness stand: "There was paid on the \$13,000 mortgage at the time of the closing simply the \$1,000. The other \$3,000 that was to be paid at the time of the closing of the title was a matter to be paid by the grantees, and that was conceded to them on the closing in the figures I have given, and the \$1,000 also, the whole \$13,000 was deducted from the purchase money, although there was only \$12,000 unpaid."

Mrs. Levy, as the owner of the \$13,000 mortgage, was entitled to a payment of \$4,000 thereon before discharging the lien of the collateral mortgage on the Allen street property; the plaintiffs paid \$1,000, and the balance of \$3,000 was due to her from her husband and his co-defendant as vendees of the Madison street property under the contract with plaintiffs. If she saw fit to extend to the vendees further time in which to pay it did not concern the plaintiffs.

The sale of the Madison street property and the collateral mortgage on the Allen street property to secure the payment of the third mortgage for \$13,000 on the Madison street property are one transaction and are to be construed together. The vendees in the Madison street contract were given the full credit for the \$13,000 mortgage when taking title, notwithstanding the fact that the vendors (the plaintiffs) had paid \$1,000 thereon to the assignee thereof, Mrs. Levy. The bald proposition of the vendees is that while there is really due on said mortgage only \$12,000, they are to evade pay-

N. Y. Rep.] Opinion of the Court, per EDWARD T. BARTLETT, J.

ment of \$1,000 of the purchase money paid for their account by the vendors, in order to escape loss under their contract to sell the Allen street property free and clear of all incumbrances.

We are not called upon to determine the position of the vendees if they had refused to take title on the law day; the question now presented is as to the vendors' rights, the vendees having taken title subject to the \$13,000 mortgage. The appellant vendees insist that the payment of \$1,000 to Flora Levy was a transaction that cannot be considered in the matter of the sale of the Madison street property, and that if vendors have any remedy it is an action for their subrogation to the extent of the amount in question, to the rights of Flora Levy in the \$13,000 mortgage.

We are of opinion that this view of the legal situation is erroneous, and that the payment of the \$1,000 by vendors is to be treated in law as a part of the purchase money, and the vendees having refused to pay the same on closing title, a vendor's lien was at once impressed upon the premises sold.

It is of no importance whether the defendant Louis J. Levy was the real purchaser of the \$13,000 mortgage and the collateral mortgage, using his wife's name as a cover. We may assume Mrs. Levy purchased in good faith. The vendees were entitled by the terms of the collateral mortgage to secure its satisfaction by payment of \$4,000 on the \$13,000 mortgage; the vendees, by accepting title to the Madison street premises on the law day, took it subject to the mortgage upon which the vendors had paid \$1,000. The vendees now insist that while they were allowed the full amount of the \$13,000 on taking title, when in fact only \$12,000 was due thereon, they are under no liability to refund the vendors the \$1,000 paid under the express terms of the collateral mortgage. In a court of equity such a suggestion cannot be entertained — forms give way to substance — and the vendees must pay for the premises the sum agreed upon; they cannot escape payment of one thousand dollars by reason of Mrs. Levy's pur-

chase of the \$13,000 mortgage. The rights of the parties were not changed by that incident.

Mr. Warvelle in his recent treatise on the "American Law of Vendor and Purchaser of Real Property" (Vol. 2, § 678) states: "The implied lien of a vendor for the unpaid purchase money, though having many apparent analogies in the law, is nevertheless *sui generis* and distinguished from all those things to which it may bear some resemblance. * * * It appears to be founded upon the presumption that the vendor does not intend unconditionally to part with his land without payment, and that, in common honesty, he who buys land from another should pay for it, or if he does not that the land should be held for whatever he fails to pay."

It has been sometimes said by learned courts that equity judges have experienced difficulty in finding a solid basis upon which to rest the lien. As between the original parties and persons having actual notice of the lien no better foundation is required than that above stated. (*Garson v. Green*, 1 Johns. Ch. 308; *Bradley v. Bosley*, 1 Barb. Ch. 125; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Seymour v. McKinstry*, 106 N. Y. 230, 239; *Dusenbury v. Hulbert*, 59 N. Y. 541.)

The order appealed from should be affirmed and judgment absolute ordered for the plaintiffs on appellants' stipulation, with costs in all the courts.

CULLEN, Ch. J., WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur; GRAY, J., absent.

Ordered accordingly.

JOHN R. PLATT, Appellant, v. HANNAH ELIAS, Respondent,
Impleaded with Others.

1. EVIDENCE—PRESUMPTION OF UNDUE INFLUENCE ARISING FROM MERETRICIOUS RELATIONS ONE OF FACT. The presumption that a woman living in meretricious relations with a man has by the exercise of undue influence obtained money from him is a presumption of fact not of law; it leaves the trial court at liberty to find undue influence from the

N. Y. Rep.]

Statement of case.

fact of such relation, but does not compel it to do so, especially in a case where the presumption is overcome by testimony,

2. IMMORAL CONSIDERATION NOT RECOVERABLE. Where illicit sexual intercourse is the consideration for the payment of money and the money has been paid the courts will not aid the donor to recover it.

Platt v. Elias, 108 App. Div. 365, affirmed.

(Argued October 19, 1906; decided November 20, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 21, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The plaintiff brought this action against Hannah Elias and fourteen banks and trust companies to impress a trust upon moneys alleged to have been extorted from him by the defendant Elias, and to have been deposited by her with the other defendants. The complaint was verified on May 27, 1904. It charged that "between 1896 and the date hereof said defendant has blackmailed this plaintiff out of upwards of \$685,385." It contained numerous specific allegations of obtaining money by means of threats and extortion. The substance of these allegations was that the plaintiff, already an old man, entered upon illicit relations with the defendant Elias, then a comparatively young woman, a negress and a courtesan, and that after their adulterous relations had existed for some years she began to extort money from him by threats of publicity and threats of personal assault and succeeded in thus obtaining from him the large sum already mentioned, the greater part of which was paid to her subsequently to the 1st day of January, 1896.

The defendant Elias interposed an answer denying all allegations of blackmail, extortion or threats and setting up the following affirmative defense: "That prior to and since the 1st day of January, 1896, this plaintiff has voluntarily cohabited with and maintained this defendant, and this defendant has been the mistress and friend of this plaintiff, and that this plaintiff, prior to and since the 1st day of Janu-

ary, 1896, voluntarily gave this defendant, as his mistress and friend, various sums of money, the exact amounts of which, and the dates upon which said sums were given by this plaintiff to this defendant, this defendant is unable to state. That all the moneys received by this defendant from this plaintiff were given voluntarily by this plaintiff to this defendant, as his mistress and friend."

The other defendants served answers which do not call for any consideration upon this appeal except to say that they sufficed to put the plaintiff to his proof.

Upon the trial at the close of the evidence on both sides the court rendered judgment in favor of the defendant directing a dismissal of the complaint, but not upon the merits, on the ground that the proof failed to sustain the claim of the plaintiff, who based his right to recover solely upon allegations of blackmail and extortion by means of threats of bodily harm and the exposure of his relations with the defendant Elias. The trial judge also held that relief could not be granted on the ground of undue influence, as it had not been alleged, and consequently was not in issue. He made elaborate findings of fact which established the payment of money substantially as alleged by the plaintiff, but negatived every general or specific allegation of blackmail or extortion contained in the complaint, and he found as a conclusion of law that such sums of money as were mentioned in the complaint or as had been proven to have passed from the plaintiff to said defendant were not obtained by said defendant from the plaintiff by blackmail, threats or extortion.

This judgment at the Special Term was unanimously affirmed by the Appellate Division in an opinion which, among other things, contains the following: "It is undoubtedly true that the relations which are proven to have existed between the plaintiff and the defendant Elias were such as would give rise to a presumption that the large sums of money which the latter received from the former were acquired through undue influence, but that presumption is entirely overcome by the testimony of the plaintiff himself."

Lyman E. Warren and *Ira D. Warren* for appellant. Judgment should have been rendered for the plaintiff on the findings of the trial court, and on the undisputed evidence. (*Whalen v. Whalen*, 3 Cow. 537; *Eadie v. Simmons*, 26 N. Y. 12; *Matter of Will of Smith*, 95 N. Y. 522; *Brice v. Brice*, 5 Barb. 541; *Cowen v. Cornell*, 75 N. Y. 101; *Seers v. Shafer*, 6 N. Y. 268; *Clark v. Fisher*, 1 Paige, 176; *Bevans v. Jarnagan*, 5 Baxt. 282; *Cooke v. La Motte*, 15 Beav. 240; *Robinson v. Cox*, 9 Mod. 263.) The evidence in this case is amply sufficient to sustain a judgment on the ground that this money was obtained by the defendant Elias by fraud and extortion. (*Weller v. Weller*, 44 Inn, 172; *People v. Thomson*, 97 N. Y. 313; *People v. Wightman*, 104 N. Y. 598.) The complaint states a good cause of action in equity to have defendant Elias and the other defendants declared to be constructive trustees for the plaintiff. (*Haddon v. Lundy*, 59 N. Y. 326; *Zimmerman v. Kinkle*, 108 N. Y. 282; *Haddon v. Dundy*, 59 N. Y. 320; 2 Story's Eq. Juris. § 1255; Pom. Eq. Juris. § 1053; *N. Y. & B. F. Co. v. Moore*, 102 N. Y. 667; *Newton v. Porter*, 69 N. Y. 133; *National Bank v. Barry*, 125 Mass. 20; *Platt v. Platt*, 2 T. & C. 25; 58 N. Y. 646; 61 N. Y. 145.)

Daniel Daly for respondent. The rule requiring a recovery to be *secundum allegata* still prevails in this state. (*Wright v. Delafield*, 25 N. Y. 270; *Bank v. Fames*, 1 Keyes, 592; *Truesdell v. Sarles*, 104 N. Y. 167; *Day v. Town of New Lots*, 107 N. Y. 154; *Baird v. Mayor, etc.*, 96 N. Y. 603; *Dickinson v. Mayor, etc.*, 92 N. Y. 588; *Fisher v. Rankin*, 25 Abb. [N. C.] 194.) The essence of the charge in the complaint was the obtaining of money by means of threats, intimidation, coercion, force, violence and assault, and the fear thereby induced. Such a charge is vitally distinct from one of obtaining money by the subtle and comparatively pacific means known to the law as the exercise of "undue influence." (*C. A. Society v. Loveridye*, 70 N. Y. 394; *Rollwagen v. Rollwagen*, 63 N. Y. 520; *Matter*

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.

of *Snelling*, 136 N. Y. 517; *Horn v. Pullman*, 72 N. Y. 277.) The evidence failed to establish the cause of action alleged. (*Krekeler v. Aulbach*, 16 N. Y. 374; *Marden v. Dorthy*, 160 N. Y. 45; *Hay v. Knauth*, 160 N. Y. 303; *Cronin v. Lord*, 161 N. Y. 95; *Hamilton v. N. Y. C. R. R. Co.*, 51 N. Y. 106.) The trial court properly refused to find that "the said sum of \$684,829.25 was obtained of the plaintiff by the defendant Hannah Elias by undue influence exercised by her over the plaintiff." (*Hay v. Knauth*, 160 N. Y. 303; *Deland v. Richardson*, 4 Den. 95; *Marvin v. U. T. Ins. Co.*, 85 N. Y. 278; *Matter of Rand*, 28 Misc. Rep. 465; *Matter of Westerman*, 29 Misc. Rep. 409; *Matter of Mondorf*, 110 N. Y. 450.)

WILLARD BARTLETT, J. In view of the findings of fact made by the trial court and the unanimous affirmance by the Appellate Division, I am unable to perceive any ground which would justify us in interfering with this judgment. So far as the express allegations of the complaint are concerned, the learned judge at Special Term has found that the respondent did not commit any of the acts of blackmail or extortion which are charged therein. These findings being amply sufficient to sustain the conclusions of law and having been unanimously affirmed by the Appellate Division leave no question open for consideration in this court unless it be true, as is contended in behalf of the appellant, that notwithstanding the absence of any specific averment of undue influence in the complaint the trial court was bound to presume the existence and exercise of such influence by reason of the facts which were found as to the illicit sexual relations between the appellant and the respondent at the time of making the gifts which are the subject of attack in this suit. The learned counsel for the appellant invokes the doctrine which is nowhere better stated than by Mr. Justice Cooley in his well-known work on the Law of Torts in these words: "Where a transaction is brought about while the parties are living in illegal sexual relations it is always open to suspicion of fraud or

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

undue influence, and if it is a gift or a sale for an inadequate consideration, or if it is specially beneficial to one party rather than to the other, the party benefited by it will be under the necessity of showing that no advantage was taken and that it was the result of free volition." (2 Cooley on Torts [3d ed.], 982.)

The proposition presented for our sanction is that the rule thus laid down made it the duty of the judge at Special Term to find that the gifts from the appellant to the respondent were induced by the exercise of undue influence as soon as he was convinced that the donor was maintaining the donee as his mistress. This proposition necessarily rests upon the hypothesis that the presumption of undue influence arising out of illicit sexual cohabitation is a presumption of law rather than a presumption of fact. If this view as to the character of the presumption be correct, then proof which establishes the existence of the illicit relation would necessarily demand the inference that gifts made during the continuance of that relation were brought about by the exercise of undue influence; for a presumption of law is a rule which requires that a particular inference *must* be drawn from an ascertained state of facts. If, on the other hand, the presumption of undue influence in the case of a gift by a man to a woman with whom he has a meretricious connection is only a presumption of fact, it merely warrants the trial court in deducing the exercise of undue influence from the fact that the sexual relations between the parties were improper, but does not absolutely demand that such an inference shall be drawn from that fact. In other words, a presumption of fact leaves the trial court at liberty to infer certain conclusions from a certain set of circumstances, but does not compel it to do so.

An examination of the various cases relied upon to support the position of the appellant shows quite clearly, I think, that the presumption of undue influence in respect to gifts by a man to his mistress has generally been regarded by the courts as a presumption of fact. The case of *Dean v. Negley* (41 Pa. St. 312) was a feigned issue to determine the validity

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.

of the will of one William Johnston. The parties opposing the will offered to prove upon the trial among other things that Johnston both before and after the death of his wife maintained a continuous adulterous intercourse with a Mrs. Bolton who was the mother of the children to whom he had devised the bulk of his estate. It was held that the trial court erred in refusing to receive proof of the relation between the testator and Mrs. Bolton. The opinion of the Supreme Court was delivered by LOWRIE, C. J., who said: "There can be no doubt that a long-continued relation of adulterous intercourse is a relation of great mutual influence of each over the mind and person and property of the other. History abounds with proofs of it, and it requires no very long life, or very close observation of persons around us, in order to reveal the fact. * * * If, then, there was such a relation between the testator and Mrs. Bolton at the time of making the will, as was offered to be proved, we think that that fact, taken in connection with the devise to Mrs. Bolton's daughters, is evidence of an undue influence exerted by her over the testator, and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will. I have, myself, thought that it raised a *presumption of law* of undue influence, but we do not so decide, but leave it as a question of fact merely." Here we have a distinct refusal by the Supreme Court of Pennsylvania to treat the presumption as one of law. In other states where it has been asserted that the exercise of unlawful influence will be presumed in cases where the parties to a gift live in adulterous or illicit relations in the absence of proof of a legal consideration, I find nothing in the language of the courts which conveys the idea that they regarded the presumption as one which *must* be adopted, as would be the case if it were deemed a presumption of law. The import of the decisions is merely that the jury or the chancellor, as the case may be, will be justified in assuming the exercise of undue influence under such circumstances so as to impose upon the donee the burden of establishing a lawful consideration, but

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

that the rule which permits this to be done is not imperative upon the trial court so as to constrain it to reach that conclusion. (*Shipman v. Furniss*, 69 Ala. 555; *Leighton v. Orr*, 44 Ia. 679, and *Hanna v. Wilcox*, 53 Ia. 547.) In the case last cited an attack was made upon a conveyance executed by a deceased grantor to a woman with whom he was living in adulterous relations at the time when the deed was made. "The exercise of unlawful influence," said the Supreme Court of Iowa, "will be presumed where the parties to a deed live in adulterous relations in the absence of proof of a lawful consideration." This remark must have been intended to assert the rule stated as a presumption of fact rather than a presumption of law, because the case was triable in the Supreme Court *de novo* and the opinion was rendered at the conclusion of the trial therein.

Irrespective of judicial authority in other states, however, and even if a different view prevailed elsewhere, I think it is carrying the rule of evidence applicable to such cases as that before us far enough to hold that the presumption under consideration is simply a presumption of fact which will sustain a judgment based upon undue influence if the trial court chooses to adopt it, but which the trial court is not constrained to adopt. I see no reason why the presumption here should be any stronger than that which arises in a prosecution for larceny by reason of the recent possession of stolen goods. While the recent possession of stolen property by a person is held to raise a presumption of guilt it is not one which necessarily requires a conviction but is merely a fact for the consideration of the jury under all the circumstances of the case. (*People v. Weldon*, 111 N. Y. 569.) In the case at bar the Appellate Division recognized that the relations between the appellant and the respondent had been proven to be such as would have authorized a presumption of undue influence by the trial judge if he had seen fit to make it; but the opinion goes on to declare that such presumption was entirely overcome by the testimony of the plaintiff himself. In other words, the Appellate Division has held, correctly, as I think,

that the presumption was not absolute, and has further asserted, in the exercise of its power to deal exclusively with the facts, that the learned trial judge did right in rejecting it.

While it may seem unfortunate that the effect of the present judgment is to leave in the possession of the respondent a very large sum of money which she obtained from the appellant as his mistress, it is to be observed that the courts below have found in effect that the payments were wholly voluntary. If it be true that they were induced by the sexual intimacy between the parties a court of equity could not interfere at the instance of the donor to enable him to recover his money inasmuch as the gift has been fully executed and the consideration was plainly immoral. Where illicit sexual intercourse is the consideration for the payment of money and the money has been paid, the courts will not aid the donor to recover it back any more than they would enforce in behalf of a woman the unexecuted promise of a man to pay her money in consideration of such intercourse. (2 Schouler's Personal Property [3d ed.], § 61.) "That which one promises to give for an illegal or immoral consideration he cannot be compelled to give; and that which he has given on such a consideration he cannot recover. The law will not afford relief to either party, *in pari causa turpitudinis*; but leaves them just where they have placed themselves." (*Monatt v. Parker*, 30 La. Ann. 585.)

I find no error of law in this record; the determination of the courts below upon the question of fact is not reviewable here; and I, therefore, advise the affirmance of the judgment, with costs.

CULLEN, CH. J., HAIGHT, VANN, WERNER and HISCOCK, JJ., concur; GRAY, J., absent.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MEYER W. LIVINGSTON, Appellant, v. WILLIAM E. WYATT, as Justice of the Court of Special Sessions of the City of New York, Respondent.

1. WRIT OF PROHIBITION. Where on the return to an alternative writ of prohibition to restrain the further proceedings of a magistrate before whom an information is laid, the relator neither traverses the return nor moves for a new one, but moves for an absolute writ without a trial of the issues, the return is conclusive as to all matters denied by the respondent and as to any new matter alleged therein not denied by the relator, including the substance of the information.

2. CRIMES — VERIFICATION OF INFORMATION. An information will be regarded as verified, if returned as made "upon the information and belief of the affiant" that a crime has been committed by a person named.

3. INFORMATION — SUFFICIENCY OF — CODE CR. PRO. §§ 145, 149, 151, 194, 205, 608. An information sufficient to authorize a magistrate to issue a subpoena for the purpose of investigating whether a crime has been committed must be sworn to and cannot rest wholly on information and belief. Facts enough must be stated to show that the complainant is acting in good faith, and that he has reasonable grounds to believe that a crime has been committed by some person named or described. The law does not permit an inquiry based upon hearsay and the mere chance that some crime may be discovered, and a magistrate acts without jurisdiction upon an information of that character.

4. WHEN SUBPENA ISSUED BY MAGISTRATE TO DISCOVER COMMISSION OF A CRIME IS VOID. A subpoena served upon a person reciting that a magistrate has "reason to suppose an offense has been committed and for the purpose of investigating whether it has been committed" commands such person to appear before him "for that purpose" and which does not name or describe any person as defendant (Code Cr. Pro. § 612) is void upon its face and calls for obedience to its commands on the part of no one.

5. REMEDY OF PERSON SERVED WITH VOID SUBPENA IS BY WRIT OF HABEAS CORPUS NOT BY WRIT OF PROHIBITION. The remedy of a person served with a void subpoena is not by an application for a writ of prohibition to restrain the magistrate from further proceeding with the investigation; that writ is issued only in the exercise of a sound judicial discretion when there is no other remedy; he may properly refuse to obey the subpoena, and if any attempt is made to punish him he may have relief through the writ of habeas corpus, which, if denied him in the first instance, may be secured on appeal.

People ex rel. v. Livingston v. Wyatt, 113 App. Div. 111, affirmed.

(Argued June 12, 1906; decided November 20, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 29, 1906, which affirmed an order of Special Term denying a motion for an absolute, and vacating an alternative writ of prohibition.

The relator alleged in his petition for the writ that on the 10th of December, 1905, a paper purporting to be a subpoena was served upon him, of which the following is a copy, viz. :

“ STATE OF NEW YORK, ss. :

“ In the Name of the People of the State of New York, to Meyer W. Livingston, No. 212 West 42nd Street.

“ Having reason to suppose an offense has been committed and for the purpose of investigating whether it has been committed, you are commanded to appear before me, William E. Wyatt, a Justice of the Court of Special Sessions of the First Division of the City of New York, at the Building for Criminal Courts, Franklin and Center Streets, in said city on the 19th day of December, 1905, at three o'clock in the afternoon of that day as a witness for that purpose. And then and there to bring with you and produce all the books, papers and records in your possession or under your control of the firm of Klaw & Erlanger covering the period from January, 1896, down to the present time, including journals, day books, cash books, blotters, ledgers; also all checks drawn by said firm on any bank and returned to said firm; also all check books, stub books and bank pass books of said firm; all letters, copies of letters and letter press copy books of said firm; also the originals and copies of the theatrical agreement entered into in 1896 between Marc Klaw, Abraham L. Erlanger, Samuel F. Nirdlinger (sometimes known as Samuel F. Nixon), J. Fred Zimmerman, Charles Frohman and Al Hayman; also the original and copies of the theatrical agreement entered into on or about April 23, 1900, between the same persons; also the originals and all copies of any agreements entered into between the last named persons or any of them or by the firm of Klaw & Erlanger and each or any of

N. Y. Rep.]

Statement of case.

the following named persons, viz. : Moses Reis, Julius Cahan, Edward D. Stair, John A. Haviland, Stair & Haviland.

"And for a failure to attend or produce said books and papers you will be deemed guilty of criminal contempt and liable to a fine of \$250 and imprisonment for thirty days."

The subpoena was duly signed by the magistrate over his official title.

The relator further alleged, in substance, that eighteen other persons whose names were given had been served with a similar paper; that the information was insufficient to confer jurisdiction upon the magistrate; that the relator was "unaware as to whether or not he" was himself a defendant or charged with a crime sought to be investigated; that the proceedings were conducted by the magistrate in secret; that counsel for the witnesses were excluded and that the proceedings were wholly in the interest of private parties and not to vindicate public justice.

The affidavit of Edward Bloom, read in support of the petition, stated that he was one of the witnesses upon whom a similar subpoena was served; that he obeyed the writ, was sworn by the magistrate and that his examination "was conducted by Deputy Assistant District Attorney Kresel, who was prompted with regard to many of the questions by Mr. Wickwire who, your deponent is informed and believes, is an attorney at law, connected with the office of Messrs. Guggenheimer, Untermyer & Marshall, who have heretofore represented David Belasco in the various civil actions which have been pending between Messrs. Klaw & Erlanger and David Belasco; that nearly all of the questions asked by Deputy Assistant District Attorney Kresel were prompted by the said Wickwire, who in turn was consulting what deponent believes to have been a transcript of the proceedings in the civil actions aforesaid." (*Belasco Co. v. Klaw*, 48 Misc. Rep. 597.)

An alternative writ was issued to which the respondent made return that on the 18th of December, "one Isador J. Kresel, a Deputy Assistant District Attorney," laid before him as such

magistrate "an information in writing charging, upon the information and belief of the affiant, that certain persons therein named had committed a certain definite and specified crime and praying that subpoenas might issue to require the attendance of other persons having knowledge in relation to the matter therein complained of; that the said information does not charge the relator herein with any crime or offense; that the contents of the said information and the names of the persons charged with offenses" were not set forth, because public policy, as well as the provisions of law, required that they should be kept secret "until the arrest of the defendant against whom a warrant" might be issued; that for the same reason all persons were excluded from the examination "except the witness under examination, a stenographer, the informant and the counsel assisting him, one Arthur M. Wickwire;" that "acting as a magistrate and having duly determined that the facts set forth in the said information constitute a crime and that the interests of public justice require that the matter should be inquired into and that the depositions of persons having knowledge of the said matters should be secured and the said informant having requested of me subpoenas for the witnesses whom he desired to examine in support of his information, I duly issued said subpoenas including among others a subpoena directed to the relator herein." The answer to the return set forth no fact and made no denial, but simply alleged certain legal conclusions.

The Special Term denied the application for an absolute writ and vacated the alternative writ. The Appellate Division affirmed unanimously as matter of law, and not in the exercise of discretion, and the relator appealed to this court.

Edward Lauterbach and *Alfred Lauterbach* for appellant. The magistrate's return having failed to show jurisdiction on his part to proceed, the absolute writ should have been granted. (*Matter of Travis*, 55 How. Pr. 347; *People v. Mallon*, 39 How. Pr. 454; *King v. Lovet*, 7 T. R. 152; *King v. Read*, 2 Doug. 485; *People v. Pillion*, 78 Hun, 74; *People v.*

Dumar, 106 N. Y. 502; *People ex rel. Sandman v. Tuthill*, 79 App. Div. 24; *People ex rel. Fleming v. Mayer*, 41 Misc. Rep. 289; *People ex rel. Burbank v. Woods*, 21 App. Div. 245.) The defendant having stated in his return that the alleged information on which he founded his investigation was based entirely upon the information and belief of the alleged informant, not only as to the identity of the alleged offenders, but also as to the very commission of the crime itself, the said alleged information was a nullity, and the magistrate was without jurisdiction to proceed. (*Matter of Peck v. Cargill*, 167 N. Y. 391; *Matter of Attorney-General*, 22 App. Div. 285; *Matter of McKelvey v. Marsh*, 63 App. Div. 396; *People ex rel. Sampson v. Dunning*, N. Y. L. J. May 12, 1906; *Matter of Leslie*, 19 Misc. Rep. 667; *Matter of Rothschild*, 11 Abb. [N. C.] 122; *Kuh v. Barnett*, 25 J. & S. 234; *Roome v. Webb*, 1 Code Rep. 114; 3 How. Pr. 327; *Rateau v. Bernard*, 12 How. Pr. 464; *People v. New York*, 32 Barb. 102; *Hecker v. New York*, 28 How. Pr. 211; *Bostwick v. Elton*, 25 How. Pr. 362; *Champlin v. New York*, 3 Paige, 573; *Walker v. Devereaux*, 4 Paige, 299.) There being no proof whatever that the alleged complaint before the magistrate was under oath, the absolute writ of prohibition should have been granted. (*People ex rel. Farley v. Crane*, 94 App. Div. 397; *Wilson v. Robinson*, 6 How. Pr. 112; *Vredenburg v. Hendricks*, 17 Barb. 179; *Pratt v. Bogardus*, 49 Barb. 89.) The paper served upon relator and many other witnesses, purporting to be a subpoena, being in utter non-compliance with the forms of law as prescribed by the Code of Criminal Procedure, section 612, the defendant should be prohibited from proceeding to enforce the attendance of the relator and the other witnesses thereunder at the alleged investigation before him. (Code Cr. Pro. § 612.) The writ of prohibition is the proper remedy herein. (*People ex rel. Sandman v. Tuthill*, 79 App. Div. 24; *Quimbo Appo v. People*, 20 N. Y. 531; *People ex rel. Mayer v. Nichols*, 79 N. Y. 582; *People ex rel. Patrick v. Fitzgerald*, 73 App.

Opinion of the Court, per VANN, J.

[Vol. 186.]

Div. 344; *People ex rel. Morse v. Nussbaum*, 55 App. Div. 245; *Collier v. Collier*, 1 Coke, 201; *Sweet v. Hulbert*, 51 Barb. 312; *Watts v. Conisby*, Hobart, 247a; 23 Am. & Eng. Ency. of Law [2d ed.], 223; 3 Black. Comm. 112; Wood on Mandamus, 106; 2 High's Ext. Leg. Rem. ch. 21, § 781; 2 Crary's N. Y. Pr. [5th ed.] 87; 2 Spelling on Injunctions [2d ed.], 1499.)

William Travers Jerome, District Attorney (Robert C. Taylor of counsel), for respondent. The magistrate had jurisdiction to conduct the examination. (2 R. S. [3d ed.] 793, §§ 2, 3; Code Cr. Pro. §§ 145, 148-150; *People v. Hicks*, 15 Barb. 153; *Blodgett v. Ruce*, 18 Hun, 132; *Wilson v. Robinson*, 6 How. Pr. 110; *State ex rel. Long v. Keyes*, 75 Wis. 288; *People v. Burns*, 2 Park. Cr. Rep. 34; *Matter of Boswell*, 34 How. Pr. 347; *Stewart v. Hawley*, 21 Wend. 561; *Payne v. Barnes*, 5 Barb. 465; *Sleight v. Ogle*, 4 E. D. Smith, 445; *Matter of Davies*, 168 N. Y. 89.) Prohibition will not lie where there is any other remedy. (*People ex rel. Hummel v. Trial Term*, 184 N. Y. 30; *People ex rel. Ballin v. Smith*, 184 N. Y. 96.)

VANN, J. The return states that a written information was laid before the magistrate charging, upon information and belief, that certain persons therein named had committed a definite and specific crime. The information itself was not made a part of the return because in the opinion of respondent public policy forbade, but it was expressly stated that the relator himself was not charged with any offense.

If the return was not full enough the relator should have moved for a further return instead of moving for an absolute writ upon the papers as they were. He neither traversed the return as made nor moved for a new one, but in effect demurred to the facts stated as insufficient to show jurisdiction in the magistrate to proceed with the investigation. Upon a motion for an absolute writ without a trial of the

N. Y. Rep.] Opinion of the Court, per VANN, J.

issues, the return was conclusive as to all matters denied by the respondent and as to any new matter alleged therein not denied by the relator, including the substance of the information.

It is insisted that the information should have been sworn to in order to give the magistrate jurisdiction to take any action, but the return shows by fair implication that this was the fact, for it is alleged that the information in writing charged "upon the information and belief of the affiant" that a crime had been committed by a person named. An affiant is one who has made an affidavit, and an affidavit is a written statement sworn to before some officer authorized by law to administer oaths. (Law Dict., Black, 49; Anderson, 39; Bouvier, 111.)

It is further claimed that the information, even if sworn to, was insufficient because the allegations thereof were stated only upon information and belief, and that it does not appear that the sources of information or the grounds of belief were set forth.

Originally an information was a criminal proceeding at the suit of the king without a previous indictment or presentment by a grand jury. It could be preferred only by a responsible public officer when duly supported by affidavit, was limited to misdemeanors and was a substitute for an indictment. In this sense it is unknown to the law of this state. By the Revised Statutes it was called a complaint relating to a criminal offense. (3 R. S. 706.) By the Code of Criminal Procedure it is defined as "the allegation made to a magistrate, that a person has been guilty of some designated crime." (Code Cr. Pro. § 145.) The statute does not expressly provide that it is to be sworn to, nor even that it must be in writing, although the word "allegation" from the analogy of other judicial proceedings points to that formality. Some light is thrown upon the substance and office of the information by other sections, which we quote as follows:

"When an information is laid before a magistrate, of the commission of a crime, he must examine under oath the

informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them." (§ 148.)

"The depositions must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the crime and the guilt of the defendant." (§ 149.)

"If the magistrate be satisfied therefrom, that the crime complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest." (§ 150.)

The form for a warrant, as authorized by section 151, contains the following recital: "Information upon oath, having been this day laid before me that the crime of has been committed and accusing," etc.

Section 194 provides that "At the examination (after the arrest of the accused) the magistrate must, in the first place, read to the defendant the depositions of the witnesses examined on the taking of the information," etc.

"The magistrate or his clerk must keep the depositions taken on the information or on the examination * * * and must not permit them to be inspected by any person, except," etc. (§ 205.)

"A magistrate before whom an information is laid, may issue subpoenas, subscribed by him, for witnesses within the state, either on behalf of the People or of the defendant." (§ 608.)

There is some confusion in the authorities as to what an information really is, for the term is frequently used to designate the deposition or affidavit upon which a criminal warrant is issued. The statute itself is not free from doubt upon the subject. An affidavit taken before a magistrate may be full enough to perform the function both of an information and a deposition. This is true when it sets forth facts sufficient to authorize a warrant without further evidence, but when more proof is required and it is necessary to subpoena witnesses and take their depositions, an information is essential.

Its office is that of a complaint, as the Revised Statutes called it. Depositions are the authority for the warrant, as the magistrate must be satisfied "therefrom," which refers to the depositions only. Something less is required in an information than in a deposition, as otherwise there would be no occasion for the latter. The deposition must set forth facts tending to show that a crime has been committed and that there is reasonable ground to believe that the defendant committed it. While the information need not go so far as the deposition, still it cannot rest wholly on information and belief, but facts enough must be stated to show that the complainant is acting in good faith and that he has reasonable grounds to believe that a crime has been committed by some person named or described.

From all the analogies of the law, both civil and criminal, the information is intended to be made upon oath. While the statute does not expressly require it, we think it is necessarily implied, for otherwise an unfounded accusation could be set on foot and an investigation instituted upon unsupported assertion without any proof whatever. Business secrets could be exposed and private papers invaded through the worst of motives. Malice, civil actions, business rivalry, speculation or curiosity might be the sole foundation for a useless and oppressive proceeding. Neither the great lawyers who drafted the Code of Criminal Procedure, nor the legislature which enacted it into law, intended that a criminal investigation should be made by a magistrate without evidence given under the sanction of an oath and subject to the penalty for perjury if willfully false. The rule as to grand juries has always been different in this country for they are clothed by the common law with inquisitorial powers and, of their own motion, may make full investigation to see whether a crime has been committed, and if so, who committed it. They may investigate on their own knowledge, or upon information of any kind derived from any source deemed reliable; may swear witnesses generally and may originate charges against those believed to have violated the criminal

laws. (Code Cr. Pro. § 259; *Hale v. Henkel*, 201 U. S. 43; Wharton's Criminal Pleading and Practice [8th ed.], § 337; Thompson & Merriam on Juries, §§ 614, 617.)

The danger of prosecuting before a magistrate without any legal proof is apparent when the subpoena in question is read, as it calls for all journals, day books, order books, blotters, ledgers, checks, check books, stub books, bank pass-books, letters, copies of letters, etc., covering a period of nine years. In addition, it calls for various contracts made by parties shown to be interested in pending litigation with a party whose counsel was also counsel for the complainant. No business secret would remain unknown if such a command were obeyed. The subpoena was suggestive of private ends and furtive aims. A prudent magistrate should proceed with the utmost caution when he has reason to suspect that a criminal proceeding was commenced before him, not to vindicate public justice, but to serve some private purpose, and should withhold process until satisfied that the complainant is acting in good faith in behalf of the People and not to aid personal objects.

We have already pointed out the nature of the proof required in an information. Suspicion is not enough, and information and belief are not enough, unless facts are stated showing the source of the information and the grounds of belief. The information should fairly warrant the inference by the magistrate that in good faith and on reasonable grounds the complainant believes that a definite crime has been committed by a designated person. There is then a proper foundation upon which to issue subpoenas and take depositions; whereas without it the inquiry is prosecuted on the mere chance that some crime may be discovered. The statute does not permit simple hearsay to become the sole basis of such a proceeding. The highest care of the law is personal liberty, and construing the statute in the light of that principle, we think that the respondent was without jurisdiction to entertain the proceeding or to require the attendance of witnesses, because sufficient proof was not laid before him.

Even upon the assumption that the magistrate had acquired jurisdiction to investigate, the subpoena served upon the relator showed upon its face that it was issued for a purpose not authorized by law and that it did not name or describe any person as defendant, as required by law. (Code Cr. Pro. § 612.) The magistrate recited in the subpoena that he had "reason to suppose an offense has been committed and for the purpose of investigating whether it has been committed," and then commanded the relator to attend before him "for that purpose." Thus it appeared that sufficient proof had not been made tending to show that an offense had been committed and that the subpoena was issued solely to see whether one had been committed or not. It did not state what the crime was, nor who the accused was, but indicated an intention to rove around and find out. The recital by the magistrate of a mere supposition followed by a declaration of his purpose to investigate to see whether the supposition was correct, indicates a voyage of discovery that the law does not tolerate.

We are of the opinion that the subpoena issued by the magistrate was void upon its face and that it called for obedience to its commands on the part of no one. We are also of the opinion, however, that while there is strong reason for believing that in this case criminal process has been used for improper purposes, still, that prohibition is not the proper remedy.

The writ of prohibition is not favored by the courts. Necessity alone justifies it. Although authorized by statute, it is not issued as a matter of right, but only in the exercise of sound judicial discretion when there is no other remedy. While it issues out of a superior court and runs to an inferior court or judge, its object is not the correction of errors nor relief from action already taken. In no sense is it a substitute for an appeal, as its sole province is to prevent the inferior tribunal from usurping a jurisdiction which it does not possess, although it runs against the exercise of unauthorized power in a proceeding of which the lower court has jurisdiction, as well as when the proceeding itself is instituted without jurisdiction. The sole question to be tried is the power of

the inferior court or magistrate to do the particular act in question. It is in effect an injunction against a court as contrasted with an injunction proper, which is granted against persons or corporations. It is not an affirmative remedy like mandamus, but purely negative, for it does not command that anything be done, but that something should be left undone. The practice in issuing and enforcing the writ is regulated by statute, but its nature, object and function, as well as the facts governing the issue thereof, are regulated by the common law. (Code Civ. Pro. §§ 2091, 2102.) It is justified only by "extreme necessity" when the grievance cannot "be redressed by ordinary proceedings at law, or in equity, or by appeal." (*People ex rel. Adams v. Westbrook*, 89 N. Y. 152, 155; *People ex rel. Hummel v. Trial Term*, 184 N. Y. 30; *Thomson v. Tracy*, 60 N. Y. 31; *Appo v. People*, 20 N. Y. 531; *Ex parte Braudlacht*, 2 Hill, 367; *People ex rel. Onderdonk v. Supervisors of Queens Co.*, 1 Hill, 195; *Fiero's Special Proc.* 278; *Hugh's Extraordinary Remedies*, §§ 762, 772; Code Civ. Pro. §§ 2091, 2102; 2 R. S. 587.)

We think the relator had a remedy which, even if indirect and inconvenient, deprived him of the right to a writ of prohibition. We do not hold that a motion before the magistrate to set aside the subpoena would be an adequate remedy, because we cannot find any right of appeal allowed to a witness from an order denying such an application. There was a remedy, however, thorough and complete, through the writ of habeas corpus. The magistrate was not only acting without jurisdiction, but the subpoena was void on its face and the relator was not bound to obey it. It was of no more effect than a blank piece of paper. He could lawfully decline to attend, or to be sworn, or to answer any question. Any attempt to punish him would have been unlawful and he would have had an absolute right to relief through this great historical writ, which is the most important process known to the law. If relief were refused in the first instance, there was a right of appeal to the Appellate Division and to the Court of Appeals, so that ultimate if not immediate justice

N. Y. Rep.]

Opinion per CHASE, J.

was certain. The writ is intended to afford prompt relief from unlawful imprisonment of any kind and under all circumstances. It reaches the facts affecting jurisdiction or want of power by the most direct method, and at once releases the applicant from restraint when it is shown to be unauthorized.

This remedy was open to the relator and his application for a writ of prohibition was properly denied, because that form of relief can be resorted to only when there is no other.

The order appealed from should be affirmed, without costs.

CHASE, J. I concur in the opinion of the court except that I am of the opinion that it is intended by section 145 of the Criminal Code to make a distinction in the certainty with which crime and the person committing the crime is described. The information must contain an allegation that *a person* has been guilty of a crime and an allegation that some *designated crime* has been committed. The omission in the said section of the Code of the word "designated" in referring to the person is intentional. Criminal-law officers frequently have indisputable evidence that a crime has been committed, but are wholly unable to designate a person as the one who committed the crime. Every person having knowledge of facts tending to designate the person who has committed the crime may wholly refrain from stating their knowledge to others.

In many counties of the state grand juries meet at very infrequent intervals, and when evidence that a crime has been committed is clear, but the person committing the crime cannot be ascertained without taking the depositions of witnesses, the delay in waiting for a grand jury to meet may result in a failure of justice. It should not necessarily be fatal to an information if it does not name or designate the person who committed the crime. I prefer to hold that an information alleging that a designated crime has been committed by a person is sufficient to require the taking of depositions if it in good faith shows that the person who committed the crime cannot be definitely named or described.

Dissenting opinion, per EDWARD T. BARTLETT, J. [Vol. 186.]

EDWARD T. BARTLETT, J. (dissenting). I agree with the prevailing opinion that the respondent was without jurisdiction to entertain this proceeding, or to require the attendance of witnesses; also with the suggested form of the information, and that it should be made under oath; also that the language of the subpoena is suggestive of "private ends and furtive aims."

This proceeding sought to lay bare the business secrets of relator and eighteen other witnesses, extending over a period of about nine years, which was on its face a flagrant abuse of criminal process based upon a void information.

On this record the learned Appellate Division should have dismissed the proceeding as void and declared the subpoenas issued therein waste paper, or issued the writ of prohibition.

As we have before us a concededly void proceeding, the appeal should be dismissed. We have no jurisdiction to determine, as we are about to do in express terms, that the writ of prohibition was properly denied by the Appellate Division. If that question was before us I should dissent from the decision about to be made in that regard.

I also dissent from the decision, which assumes jurisdiction in the court below, to the effect that habeas corpus is an adequate remedy to protect the witnesses in this case. They ought not to be required to place themselves in contempt of court, thereby incurring the peril of fine and imprisonment. Why should witnesses thus pursued and harrassed in a void proceeding be compelled to defend themselves in the courts?

The question of jurisdiction is always open, and may be raised at any stage of the proceedings.

I vote for the dismissal of this proceeding as void.

VANN and CHASE, JJ., read for affirmance; CULLEN, Ch. J., GRAY and WERNER, JJ., concur with VANN, J.; WILLARD BARTLETT, J., dissents on the ground that habeas corpus is not an adequate remedy. In other respects he concurs with VANN, J. EDWARD T. BARTLETT, J., also dissents in memorandum.

Order affirmed.

ELIZA TYSON, Respondent, v. JOSEPH H. BAULAND COMPANY,
Appellant, Impleaded with Another.

FALSE IMPRISONMENT — ERRONEOUS REFUSAL TO CHARGE AS TO LIABILITY FOR ARREST. Where it appears in an action to recover damages for false imprisonment that the person making the arrest was a special patrolman appointed by the police board of the city of New York, at the request of the defendant, under section 308 of the charter (L. 1897, ch. 378), which provided that such patrolman should "possess all the powers and discharge all the duties of the police force applicable to regular patrolmen," but that he should be paid by the party upon whose application he is appointed, and the trial court expressly charges that the acts of the officer in connection with the arrest of the plaintiff were performed in his capacity as a police officer, it is reversible error to refuse to charge that the defendant was not liable therefor, since the latter was liable only for the acts of the officer, committed by him as its employee.

Tyson v. J. H. Bauland Co., 106 App. Div. 612, reversed.

(Argued October 15, 1906; decided November 20, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 21, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John L. Wilkie, William B. Goodwin and Learned Hand for appellant. The court having charged that O'Reilly made the arrest in his capacity as a police officer the exception was well taken to the refusal then to charge that the defendant was not liable for the acts of O'Reilly, there being no evidence of the relation between them of master and servant. (L. 1897, ch. 378, § 308; *Hershey v. O'Neill*, 36 Fed. Rep. 168; *T. B. I. Co. v. Steinmeier*, 72 Md. 313; *Brill v. Eddy*, 22 S. W. Rep. 488; *Jardine v. Cornell*, 50 N. J. Law, 485; 2 Wood's Railroad Law, 1213; *Hardy v. C., M. & St. P. R. R. Co.*, 58 Ill. App. 278; *U. D. & R. Co. v. Smith*, 16 Col. 361; *Woodhull v. Mayor, etc.*, 150 N. Y. 450; *Dempsey v. N. Y.*

C. & H. R. R. Co., 146 N. Y. 290; *Lathrop v. Healy*, 50 N. E. Rep. 540; *Tucker v. E. Ry. Co.*, 54 Atl. Rep. 557.)

I. R. Oeland for respondent. No error is presented by the refusal of the court to charge that "the defendant was not liable for the acts of O'Reilly, there being no evidence of relation between them of master and servant." (*Sharp v. E. R. R. Co.*, 184 N. Y. 100.) A special police officer can act as the agent or servant of another person so as to render such person liable for his acts done within the scope of his authority. (*Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 133; *Mott v. C. I. Co.*, 73 N. Y. 550; *C. S. Mfg. Co. v. Gorsling*, 63 App. Div. 572; *Dann v. Wormser*, 38 App. Div. 460; *Tyson v. Bauland*, 68 App. Div. 310; 85 App. Div. 612.)

CULLEN, Ch. J. This action was brought against the appellant and a special police officer, Thomas O'Reilly, for damages for false imprisonment. The appellant conducted a large department store or shop in the city of Brooklyn. In August, 1898, a Mrs. Margaret Gillin, a customer at the store, while examining goods exposed for sale, left her satchel containing the sum of twenty-five dollars in money with other articles on a counter or table in the shop. While her attention was diverted from her satchel it was carried off. After stating her loss she was told by a clerk of appellant to go to the entrance of the store and to watch there for any one taking the satchel out. This she did, and observed the plaintiff with the satchel apparently seeking to leave the store. She demanded the satchel, which was surrendered to her, opened it and found her money was gone. She called the attention of a floorwalker of the defendant to the fact, and he brought the defendant O'Reilly, a special policeman, to the scene. Mrs. Gillin told the policeman of her loss, and upon such complaint being made, according to the plaintiff's testimony, the following colloquy took place between her and the police officer: "He came running over very excitedly and grabbed me by the left arm, and asked me if I had that satchel, and I said,

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

'Yes, sir, I had the satchel.' And he said, 'Well, where is the money?' I said, 'Officer, I know nothing of the money whatever. A lady on the balcony asked me if I would be kind enough to hand this satchel to this woman.' And he said, 'Oh, come off, come off, who was the other woman?' I said, 'Officer, I never saw her face before, as God is my judge.' 'Well,' he said, 'well, tell me who she is, and where the money is and I will let you go.' And I said, 'Officer, don't you dare insult me like this. You investigate this case and you will find I am telling the truth. I am a respectable married woman and the mother of children and would not be guilty of a thing like this.' He said, 'Well, then, you have to go to the station house; step outside.' I said I was a respectable married woman and lived at 1854a Pacific Street. He wouldn't listen to me, he shut me up. I did not tell him my name when I was speaking to him, he wouldn't listen." Thereupon the plaintiff was arrested, taken to the station house, detained to next day, when on examination before the magistrate she was committed to await the action of the grand jury. No bill against her was found by the grand jury. Thereafter this action was instituted. The case was submitted to the jury, which found a verdict for the plaintiff, and the judgment on that verdict has been unanimously affirmed by the Appellate Division, though it allowed an appeal to this court.

Since the affirmance of the Appellate Division was unanimous we are precluded from reviewing the motion for a nonsuit made at the close of the case, and we find no exception in the record sufficient to raise the question whether, on the state of facts as testified to by the plaintiff herself, there was not reasonable cause for believing the plaintiff to have committed the felony which appears on the trial concededly to have been committed. Though the plaintiff was, in fact, innocent, still, if the circumstances were such as would justify a careful and prudent person, acting circumspectly, in believing that the plaintiff was guilty of the offense, there was reasonable cause and the arrest was justified. (Code

Crim. Pro. § 177, subd. 3.) The complaint in this action appears to have been framed in the double aspect of an action for false imprisonment and malicious prosecution charged in a single count. On a previous appeal from a judgment recovered by the plaintiff the learned Appellate Division held that "the proof wholly failed to establish want of probable cause. The possession of the stolen property by the respondent, notwithstanding her explanation, being sufficient to support a conviction, it cannot be said that it was insufficient to warrant a prosecution. So far, therefore, as the verdict may have been based on the claims of malicious prosecution, it must be regarded as without warrant of law, and the judgment must be reversed, if for no other reason than because it may be founded on this unproven claim." (*Tyson v. Bauland Co.*, 68 App. Div. 310.) With this view we are inclined to concur, but we are at a loss to perceive why it was not equally fatal to the action for false imprisonment, for the legality of the arrest and the right to prosecute depended on exactly the same thing, to wit, the existence of reasonable or probable cause, and that, where the facts are conceded, is a question by law. But, as already said, we do not find any exception cognizable in this court to fairly raise the question.

This brings us to the further question of the liability of the appellant for the arrest by O'Reilly. He was appointed by the police board a special patrolman under the provisions of section 308 of the Greater New York charter, which authorize the appointment of such officers to do special duty at any place in the city of New York upon the persons or corporations by whom the application is made paying in advance such patrolman's salary, and as such the officers are "subject to the orders of the chief of police and shall obey the rules and regulations of the Police Department and conform to its general discipline and such special regulations as shall be made, and shall during the term of their holding appointment possess all the powers and discharge all the duties of the police force, applicable to regular patrolmen, and may be at

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

any time removed by the police board." The application for O'Reilly's appointment was made by the appellant and by it he was paid his salary. The defendant admitted in its answer that such application was made in order "to protect itself and its patrons from thieving, keep the peace on its premises and prevent mischief and disorder on the part of intoxicated or disorderly persons." It expressly denied, however, that it authorized the plaintiff's arrest, and alleged that the arrest was made solely on the authority of O'Reilly as a police officer.

We have recently, in the case of *Sharp v. Erie Railroad Co.* (184 N. Y. 100), had occasion to examine the liability of a railroad company for the acts of a deputy sheriff in the employ of the company for the protection of its property, and it was there said by Judge O'BRIEN that the railroad company employing a servant who happens to be a public officer acquires no immunity by such employment. There the act done by the employee was in the protection of the employer's property, the boy assaulted having been stealing a ride, and it was held to be a question of fact for the jury to determine whether the servant acted within the scope of his employment or in the capacity of a public officer. Here, however, the act was done by the policeman, not in the protection of his master's property, not in the discharge of the master's duty to maintain peace and order on the premises, but solely on the personal complaint of Mrs. Gillin, whose property had been stolen. Neither the defendant nor any of its employees instigated the arrest or seem to have taken any part in it except that when the altercation occurred between Mrs. Gillin and the plaintiff as to the theft, the floorwalker called the police officer to the scene. The appellant owed Mrs. Gillin no duty as to the matter. The case is not at all similar to that of *Bunnell v. Stern* (122 N. Y. 541). There the customer was invited to lay off the cloak which she was wearing while trying on a new garment. She put it on a counter, the only place provided for the purpose, from which it was stolen. It was held that the defendant was bound to use some care for the property necessarily laid aside by his implied

invitation in order to attend to the business in hand. In the present case there was no invitation, express or implied, for Mrs. Gillin to lay aside her satchel. The case was substantially the same as if money had been purloined from her pocket. Doubtless the keeper of a store or shop owes some duty to the customers who frequent it. He is bound to maintain order, and probably to eject therefrom persons whose conduct and demeanor is such as to threaten the security of the persons or property of his customers. His responsibility is not at most greater than that of a common carrier or an innkeeper. Even as to the former it has been held that there is no such privity between a railroad company and a passenger as would make it liable for the wrongful act of one passenger on another. (*Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 N. Y. 108.) It was there said that while the company has the power of refusing to receive or accept any person who is drunk, disorderly, riotous, or so demeans himself as to endanger the safety or interfere with the comfort or convenience of the passengers, and may eject from the cars any one so offending, it is not liable for wanton assault committed by one passenger upon another where there is nothing in the conduct or the appearance of the offender to warrant the conductor in anticipating danger from him. So, also, a company is not liable for the theft of an overcoat taken from the seat of a passenger, or for other property retained in his possession while traveling (*Tower v. Utica & Schenectady R. R. Co.*, 7 Hill, 47); this, of course, in the absence of negligence on the part of the company. Therefore, the appellant was in no way liable for the theft of Mrs. Gillin's property. It is urged by the learned counsel for the respondent that however this may be, the appellant assumed to protect the persons and property of its customers, and has so admitted in its answer. But in what manner did it seek to protect its customers? Not by assuming to arrest by its servants or employees any offender, but by obtaining the constant presence on the premises of a policeman, a public officer, both empowered and enjoined by law to arrest offenders, and

N. Y. Rep.]

Statement of case.

for that purpose paying his salary. In his conduct in matters not relating to duties and obligations or property of the appellant he is not to be considered as acting as its servant, but as an officer of the law. The learned trial judge seems to have been of this opinion, for in response to a request by the appellant he expressly charged that the acts of O'Reilly in connection with the arrest of the plaintiff were performed in his capacity as a police officer of the city of New York. But a further request to charge that for such act the appellant was not liable he refused, to which refusal the defendant duly excepted. This exception presents a question of law, which is before us for review. In our opinion the refusal of the learned trial judge to charge this request was manifest error. The appellant was liable only for acts committed by O'Reilly as its employee, not in his conduct as a police officer. If it be assumed that under the evidence the jury might have found that O'Reilly acted as the employee of the appellant, that would not cure the error of the court in refusing the appellant's request to charge. The jury, to say the least, might have found that O'Reilly in making the arrest of the plaintiff acted as a police officer, and the appellant was entitled in such event to the specific charge that for his act as a police officer it was not liable.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

HAIGHT, VANN, WEENER and HISCOCK, JJ., concur;
WILLARD BARTLETT, J., not sitting; GRAY, J., absent.

Judgment reversed, etc.

HUGH K. PEACE, Respondent, v. JAMES G. WILSON et al.,
Appellants.

1. JUDGMENTS — ACTIONS ON JUDGMENTS FOR MONEY BETWEEN ORIGINAL PARTIES TO THE JUDGMENT — EFFECT OF STATUTE (L. 1896, CH. 568) AMENDING SECTION 1913 OF CODE OF CIVIL PROCEDURE. The statute (L. 1896, ch. 568), which added to section 1913 of the Code of Civil Procedure, relating to actions upon judgments for a sum of money, between the original parties, a provision that such an action can be maintained

when "ten years have elapsed since the docketing of such judgment," is retroactive in its application although it contains no affirmative declaration to that effect; and, hence, an action, commenced September 20, 1901, upon a judgment docketed November 8, 1881, may be maintained by the original plaintiffs against the original defendants without alleging compliance with either of the other requirements of section 1913.

2. NEW YORK (CITY OF) — MARINE COURT — CHANGE IN NAME. The statute (L. 1883, ch. 26) providing that on and after the 1st day of July 1883, the Marine Court of the city of New York, established as a court of record in 1876, should be designated as the City Court of New York, merely changed the name of the court and had no effect upon proceedings past or pending; and a judgment obtained in the Marine Court and docketed in New York county on the 3d day of November, 1881, is not the judgment of an "extinct court," but may be enforced like any other judgment of a court of record.

Peace v. Wilson, 110 App. Div. 887, affirmed.

(Argued October 23, 1906; decided November 20, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 16, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles Edward Souther for appellants. Subdivision 1 of section 1913 of the Code of Civil Procedure could not operate retroactively, and, therefore, did not affect judgments of extinct courts of record. (*Ely v. Holton*, 15 N. Y. 595; *Matter of Prime*, 136 N. Y. 347; *Matter of Warde*, 154 N. Y. 342.)

William M. Bennett and *Victor K. McElheny, Jr.*, for respondent. Section 1913 relates only to the remedy, and, therefore, applies to all actions brought after September 1, 1896. (*Matter of Davis*, 149 N. Y. 539; *Lazarus v. M. El. Ry. Co.*, 145 N. Y. 581; *McCrea v. Village of Champlain*, 35 App. Div. 89; *Matter of Palmer*, 40 N. Y. 561; *Dickerson v. Cook*, 16 Barb. 509; *Rouge v. Rouge*, 15 Misc. Rep. 36; *Matter of Palmer*, 40 N. Y. 561; *Finch v. Carpenter*, 5 Abb. Pr. 225.)

N. Y. Rep.] Opinion of the Court, per EDWARD T. BARTLETT, J.

EDWARD T. BARTLETT, J. This is an action upon a judgment recovered in the Marine Court of the city of New York on November 3rd, 1881, by the present plaintiff, Hugh K. Peace, and William K. Peace as partners. The judgment was docketed in the office of the clerk of the city and county of New York the same day it was recovered. William K. Peace died February 26th, 1898. The plaintiff, Hugh K. Peace, is the owner of the judgment sued upon as surviving partner, as residuary legatee under the will of William K. Peace and as assignee of the executors under said will.

The present action was begun September 20th, 1901, less than twenty years having elapsed since the recovery of the original judgment.

The appellants make two principal points on this appeal: (1) That the action is between the original parties to the judgment sued upon; (2) that the plaintiff has not brought himself within the provisions of section 1913 of the Code of Civil Procedure regulating actions upon judgments.

We assume for the purposes of this case, without deciding the question, that this action is between the original parties, and governed by section 1913 of the Code. Prior to the year 1896 this section provided that no action could be maintained upon a judgment for a sum of money between the same parties unless, either (1) it was rendered against the defendant by default for want of an appearance or pleading and the summons was served upon him otherwise than personally; or (2) the court in which the action is brought had previously made an order granting leave to bring it.

The Laws of 1896 (Chap. 568) amended section 1913 by inserting the additional provision that "ten years have elapsed since the docketing of such judgment." As this section now reads either one of three conditions must exist in order to bring an action upon a judgment between the same parties, viz.: (1) Ten years have elapsed since docketing judgment; (2) judgment by default, as already pointed out; (3) order of court in which action is brought granting leave.

The plaintiff in this action relies upon the fact that ten

Opinion of the Court, per EDWARD T. BARTLETT, J. [Vol. 186.

years have elapsed since the docketing of the judgment sued upon.

The defendants insist that the amendment of 1896 had no retroactive effect, and, therefore, did not apply to the judgment sued upon, recovered in November, 1881.

It is the settled law that statutes relating to procedure are retroactive and prospective in their application without affirmative provisions to that effect.

Matter of Palmer (40 N. Y. 561) involved the enactment that "no appeal to the Court of Appeals shall be had or heard hereafter from any order or judgment in any proceeding under chapter 388 of the Laws of 1858." It was held to be retroactive in its effect, and applied to appeals then pending in the Court of Appeals from the orders mentioned in such amendment.

In *Southwick v. Southwick* (49 N. Y. 510, 517) FOLGER, J., said: "It cannot be successfully contended, as a general rule, that an act which applies only to the forms of procedure, and modes for attaining or defending rights, cannot be availed of in an action pending when it took effect. (*Neass v. Mercer*, 15 Barb. 318; *People v. Mitchell*, 45 Barb. 208.)"

In *Lazarus v. Metr. E. R. Co.* (145 N. Y. 581, 585) ANDREWS, Ch. J., wrote: "It is well settled that the legislature may change the practice of the court and that the change will affect pending actions in the absence of words of exclusion."

In *Matter of Davis* (149 N. Y. 539, 545) MARTIN, J., states: "It is a general rule that, in the absence of words of exclusion, a statute which relates to the form of procedure or the mode of attaining or defending rights is applicable to proceedings pending or subsequently commenced." (See, also, *Finch v. Carpenter*, 5 Abb. Pr. 225; *McCrea v. Village of Champlain*, 35 App. Div. 89.) It, therefore, follows that the ten years' provision of section 1913 of the Code is applicable to the judgment sued upon and this action is maintainable.

The counsel for appellants raises the additional point that the Marine Court of the city of New York is an "extinct

N. Y. Rep.]

Statement of case.

court" and, therefore, the present action cannot be maintained. In 1876 the Marine Court of the city of New York was made a court of record, and by the Laws of 1883 (Chap. 26) there was enacted "An act to change the name of the Marine Court of the city of New York to the City Court of New York," and it was therein provided that on and after the first day of July, 1883, the Marine Court of the city of New York should be designated as the City Court of New York. It was a mere change in the name of the court and had no effect upon proceedings past or pending.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur; GRAY, J., absent.

Judgment affirmed.

EASTHAMPTON LUMBER AND COAL COMPANY, LIMITED,
Respondent, v. LOUISE WORTHINGTON, Appellant.

BUILDING CONTRACT — FAILURE TO COMPLY WITH SPECIFICATIONS. A building contract is not substantially performed by substituting, for that which is expressly required, materials, methods or workmanship which, in the opinion of the contractor and his experts, are "just as good," unless the substitution relates to a matter of minor importance, is made in good faith and for sufficient reasons, and there is an adequate allowance for the difference. And where it appears from the record in an action to foreclose a mechanic's lien for a balance alleged to be due upon the contract price and for extra work in erecting a dwelling house, that the contractor willfully failed to comply with twenty or more of the express requirements of the specifications, and that no adequate excuse or explanation has been given for such failures, the evidence is not sufficient to support a finding of the trial court that there was a substantial performance of the contract.

Easthampton L. & C. Co. v. Worthington, 108 App. Div. 355, reversed.

(Argued November 15, 1906; decided November 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 20, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Burlinson Coleman for appellant. The builder, plaintiff's assignor, did not substantially perform his contract, and build the house according to the plans and specifications. (*Smith v. Brady*, 17 N. Y. 173; *Nolan v. Whitney*, 88 N. Y. 648; *Crouch v. Gutman*, 131 N. Y. 45; *Spence v. Ham*, 27 App. Div. 379; *Anderson v. Petereit*, 86 Hun, 600; *Hollister v. Mott*, 132 N. Y. 18; *Schultze v. Goodstein*, 180 N. Y. 248.)

Timothy M. Griffing for respondent. The contractor substantially performed the contract as modified by the parties. (*Woodward v. Fuller*, 80 N. Y. 312; *Nolan v. Whitney*, 88 N. Y. 648; *Crouch v. Gutman*, 134 N. Y. 45.)

VANN, J. This action was brought to foreclose a mechanic's lien filed by the contractor to secure payment of a balance alleged to be due upon the contract price and for extra work, in erecting a dwelling house for the defendant in the town of Easthampton, county of Suffolk. The trial court directed judgment for the plaintiff, the assignee of the contractor, for the entire amount claimed, and while the findings were in the short form it was found specifically "that there was a substantial performance of the contract by the contractor." The Appellate Division affirmed, but by a divided vote. The contract was in writing, and required the contractor to provide all the materials and perform all the work mentioned in the specifications, and to complete the building by the 15th of May, 1899. The contract price was \$3,150, and the extra labor and materials amounted to \$411.36, according to the claim of the contractor. The owner had paid \$2,600, leaving a balance of \$991.36, for which, with interest, judgment was rendered.

While the copy of the specifications used by the contractor differed somewhat from that retained by the architect, we

shall confine ourselves to the specifications delivered to the contractor, which he testified were a part of the contract and were used by him to build the house. Those specifications provided that "the house is to be set on 5 inch piles set 4 feet in ground to be of acceptable local wood to be approved by the architect." The contractor testified that "the house was set on locust posts. They were not set 4 feet in the ground. * * * It was not necessary on the sand or beach as that was; they went as far as perhaps two or three feet, down to frost. These piles were set upon flat stones. The flat stones were not called for in the specifications. It was better with the flat stones."

The specifications required "Hip rafters, 2 inches by 10 inches." No hip rafters were put in.

The other rafters were to be "2 inches by 6 inches, 20 inch on centers," but while the contractor put in rafters of the required size they were "but 24 inches on the center." He testified that he did this "because it makes a better job of it, it was no gain to me at all."

The first story beams were to be 2 inches by 10 inches, but beams 2 inches by 9 were put in, "because it was discovered that they were strong enough and it reduced the price."

"Stair horses, 3 inches by 10 inches," were required, but none were put in, because in the opinion of the contractor they were not needed.

"Ribbon strips, one inch by 7 inches," although required, were not put in, but smaller timber was used, because, as the contractor thought, "it made just as good a job as the others, there was really no change made, the timber used would cost more than the ribbon strip."

"Bridging, 2 inches by 2 inches," was called for but not put in and the explanation given was that "bridging 2 by 2 was out of stock, and they did not keep it in stock at any time."

The entire frame was to be covered with "1/2 inch sheathing," which in turn was to be covered with "Black Neponset building paper made by F. W. Bird & Son, E. Walpole,

Mass." The contractor testified that he did not use this paper "because it was not to be had; I used Child's paper; I consider that the red is best, and is used in preference to the black on Long Island. The black Neponset paper was not in stock at the time. * * * I should say that it (Child's paper) was as good as the other. * * * It is as expensive as the other as far as I know, I don't know just what the black would cost."

The manager of the plaintiff, testifying in its behalf, said that he knew of black Neponset paper and that it was a well-known article to the trade, but that the paper furnished he considered as good as the black Neponset. The architect testified that the paper used was porous and no better than newspaper; that it cost but fifty cents a roll while black Neponset cost about \$1.75 a roll.

"Sampson's Spot Braided Cotton Sash cord," although called for, was not used, but Silver Lake cord substituted, because, as the contractor testified, "I never heard of Sampson's cord. I did not know anything in regard to the two different kinds of cord. The kind I used, Silver Lake, is considered the best in the market. I did not know anything about Sampson's and I know that Silver Lake is good." Another witness called by the plaintiff testified that the cord used "is good quality sash cord the same as is used on the eastern end of Long Island. As compared with Sampson's cord I do not know how they would compare in cost." The architect testified that the cord used was not durable and that it is already partly worn out while that called for by the specifications is strong and durable.

The specifications required "all tin to be of Merchant's Alaska for lining, flashing and gutters." The contractor did not use the kind specified, saying, "I suppose that Alaska tin is some special brand, there are a number of different kinds. I got this at Easthampton from Mr. Grimshaw. He is the only dealer in tin. It is used on first class jobs." Mr. Grimshaw testified that Alaska tin "had been done away with some years ago. The quality of tin used was of the best."

The contractor testified: "The specifications provide for all piping to be extra heavy and guaranteed to stand pressure; all to have a coat of asphaltum for test. The asphaltum was not done; that was not put on I believe." The plumber swore that asphaltum was left off where the pipes would show, because there the pipes were bronze and painted and the asphaltum would show through. It was not omitted at the instance of Mrs. Worthington but through his own discretion as a business man.

The specifications called for "one copper, lined with tin, oval sink, 14 inches by 20 inches, with nickeled fancets, Fuller improved, nickeled traps made by Messrs. Fred Adece & Co." The contractor testified, "I can't answer whether that was done; the plumber will have to answer that;" but the plumber said: "Adece does not make those things; he buys them; he is simply a dealer in them. I can't answer whether this was done according to the specifications." The architect testified that the one called for was worth \$25 more than the one used.

In the bill for extras was an item of \$12.75 "for locust posts." The contractor testified that he charged extra for the locust posts because his contract "only took him to the sill of the house; all below was extra." The specifications provided specifically as follows: "Foundations. The house is to be set on 5 inch piles set 4 feet in ground, to be of acceptable local wood, to be approved by the architect."

Among the extras is the following item: "Planing second floor second time, \$9.75." With reference to this item the contractor testified: "In the extras there is an item for planing the second floor. The floor did not look well enough to suit Mrs. Worthington. We oiled it and it was so bad that she was very much dissatisfied with it and we planed it off for her. It was partly my fault; it was oiled and I did not make a good job of it."

All the "extras" were allowed in bulk, at the prices charged, including the two items just mentioned.

We have set forth some specimens out of more than twenty

admitted failures to comply with the specifications and at the same time have given in substance the reasons of the contractor for the omissions. The contract was not substantially performed in all respects and there is no evidence to support the finding of the trial court that it was.

There is no substantial performance when no attempt is made to comply with certain express requirements of the specifications and no excuse or explanation is given for the failure. A contract is not substantially performed by substituting for that which is expressly required, materials, methods or workmanship which, in the opinion of the contractor and his experts, are "just as good," unless the substitution relates to a matter of minor importance, is made in good faith and for sufficient reasons, and there is an adequate allowance for the difference. The owner has a right to what the contractor agreed to give him, and unless he has it or when the failure is neither willful nor substantial, is fully compensated for the omission, there is no substantial performance and there can be no recovery. It is not sufficient for the contractor to build a house, but he must build *the* house contracted for and substantially comply with the specifications as to the method of construction, materials and workmanship before he is entitled to payment. (*Crouch v. Gutmann*, 134 N. Y. 45; *Spence v. Ham*, 27 App. Div. 379; 163 N. Y. 220; *Schultze v. Goodstein*, 180 N. Y. 248.)

In the case last cited we said: "The contractor may not deliberately violate his contract by the use of earthen construction instead of iron and small pipes instead of large ones, and yet claim that he has done as he agreed because the result is just as good. Unless the owner had the right to contract for what he wanted and to get what he contracted for, there was no use in making the contract. A building contract like any other is to be fairly performed according to its terms, and any substantial change, unless authorized by the owner or architect, is made at the risk of the contractor. In order to avoid injustice the law tolerates unsubstantial deviations made in good faith, but it exacts full compensation

N. Y. Rep.]

Statement of case.

therefor and permits a recovery on the theory of substantial performance only after the proper deductions have been made. The contractor had no right to substitute his own judgment for the stipulations of the contract, or to recover on the basis of complete performance, when * * * he wilfully and intentionally used inferior and less expensive materials in the place of those agreed upon. When the owner stipulated for iron pipe he had the right to iron pipe, regardless of whether some other kind, according to the opinion of the contractor or of experts, would do as well. He agreed to pay upon the condition that iron pipe was used, and he is not obliged to pay unless that condition is performed."

Without considering any other question, we think the judgment should be reversed because there is no evidence to support the finding that the contract was substantially performed.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, HAIGHT, WERNER and HISCOCK, JJ., concur; WILLARD BARTLETT, J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
CHARLES J. TOMPKINS, Respondent.

GRAND LARCENY — PARTING WITH PROPERTY FOR AN ILLEGAL PURPOSE. The rule, that when a person is induced either by trick or device or false representations to part with his property for an illegal purpose, a conviction cannot be had of the person charged with the offense, is firmly established in this state and cannot be changed by the courts without ignoring constitutional rights and usurping legislative power. The alteration of the rule, however, is suggested to the legislature.

People v. Tompkins, 114 App. Div. 912, affirmed.

(Argued November 13, 1906; decided November 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which affirmed an order of the Court of General

Sessions of the Peace of the city of New York, arresting judgment against the defendant upon a verdict convicting him of the crime of grand larceny in the first degree.

The facts, so far as material, are stated in the opinion.

William Travers Jerome, District Attorney (Robert C. Taylor of counsel), for appellant. The decision in *McCord v. People* (46 N. Y. 470) has legalized swindling in New York in all cases where the victim is in anywise in the wrong. (*People v. Livingstone*, 47 App. Div. 283.) The doctrine of the *McCord* case is opposed to the weight of authority. (Clark & Marshall on Crimes [2d ed.], § 157; 2 Bish. New Crim. Law [8th ed.], §§ 467-469; McClain Crim. Law, § 682; May's Crim. Law [3d ed.], §§ 25, 312; 12 Am. & Eng. Ency. of Law [2d ed.], 856; *Young v. King*, 3 D. & E. 98; *Re v. Beacall*, 1 C. & P. 454; *Reg. v. Hudson*, 8 Cox C. C. 305; *Casily v. State*, 32 Ind. 62; *State v. Shadd*, 80 Mo. 358; *Matter of Cummins*, 16 Col. 491; *People v. Martin*, 102 Cal. 558; *People v. Howard*, 135 Cal. 266; *Cunningham v. State*, 61 N. J. L. 67; *Comm. v. O'Brien*, 172 Mass. 248.)

Francis I. Osborne for respondent. A reading of the first and second counts of the indictment shows that no crime was committed by the defendant. (*McCord v. People*, 46 N. Y. 470; *People v. Livingstone*, 47 App. Div. 283; *People v. William*, 4 Hill, 9; *People v. Stetson*, 4 Barb. 151; *State v. Crowley*, 41 Wis. 284.)

Per Curiam. The defendant was convicted of the crime of grand larceny in the first degree, under an indictment charging the crime, *first*, by specifying in detail the trick, device or pretense by means of which it was consummated, and, *second*, in the usual common-law form. The substance of the allegation of the first count of the indictment is that the defendant, and others associated with him, induced one Felix to part with the sum of \$50,000 upon the false representation that the defendant, as an employee of the Western Union Telegraph Company, had the means for obtaining

N. Y. Rep.]

Opinion *Per Curiam*.

advance information as to the result of certain horse races which were the subject of wagers or bets in so-called pool-rooms, and that said Felix, relying upon these false representations, went to a poolroom recommended to him by the defendant, and there made a wager or bet upon a certain horse falsely named as the winner and thus lost his money. After the defendant's conviction his counsel moved in arrest of judgment, and the motion was granted upon the ground, as stated by the learned trial court, that when a person is induced either by trick or device or false representations, to part with his property for an illegal purpose, no conviction can be had of the person charged with the crime, because that is the rule enunciated in *McCord v. People* (46 N. Y. 470). From the order thus made the learned district attorney appealed to the Appellate Division where it was affirmed, and from that decision he appeals to this court for a final review.

In a very able and elaborate argument the district attorney attacks the doctrine of the *McCord* case, the substance of which is above stated, as being contrary to the great weight of the decisions in the courts of our American commonwealths, and as inimical to the proper administration of our criminal law as applied to modern conditions. He contends that the doctrine of the *McCord* case rests upon the erroneous assumption, adopted in the earlier cases of *People v. Clough* (17 Wend. 351) and *People v. Stetson* (4 Barb. 151), that our statute relating to larceny by means of false pretense, trick or device, is regulated and limited by the recitals of the preamble to 30 Geo. 2, c. 24, which is the English statute from which our own was copied, to the effect that it is designed to reach the evil-disposed persons whose subtle stratagems, threats and devices have enabled them to obtain money, goods and merchandise "to the great injury of *industrious families* and to the *manifest prejudice of trade and credit*."

The learned district attorney is clearly right in his assertion that the law of this state, as enunciated in the cases of *Clough*, *Stetson* and *McCord*, is at variance with the rule adopted by many other states in the Union. We are also

impressed with the weight of the argument that in view of the constantly expanding ingenuity of intelligent criminals, which serves to render the administration of criminal justice more and more difficult, the law must be progressively practical in order to keep pace with the development of new forms of crime. But these arguments, impressive as they are, simply serve to suggest that it is the province of courts to give effect to existing rules of law and not to legislate. The law of this state, as set forth in the *McCord* case, has been in existence since 1837. It has become a rule of personal liberty quite as firmly established in this state as the rule of property recently re-affirmed in the case of *Perk v. Schenectady Ry. Co.* (170 N. Y. 298). Although it may be admitted that this rule, which exists only in New York and Wisconsin, is at variance with what now appears to be the more reasonable view adopted in at least twelve of our sister states, and although it may be conceded to be too narrow for the practical administration of criminal justice as applied to modern conditions, we are admonished that the remedy is not with the courts but in the legislature. We cannot change the existing rule without enacting, in effect, an *ex post facto* law. This cannot be done without ignoring the constitutional rights of many who may legally claim the protection of the rule. Neither can it be done without judicial usurpation of legislative power. In view of these fundamental obstacles to judicial relief it would be unprofitable to enter upon an elaborate discussion of the reason of the rule of the *McCord* case or the authorities for and against it, or as to what the character and scope of our decision might be if the question presented were an original one which we could decide in the light of the seventy years of experience which have elapsed since the decision in the *O'lough* case.

We can, therefore, do no more, and we feel constrained to do no less, than to supplement the recommendation made to the legislature in the somewhat similar case of *People v. Livingstone* (47 App. Div. 284), where the Appellate Division of the second department, speaking through Judge CULLEN,

N. Y. Rep.]

Statement of case.

said: "*We venture to suggest that it might be wise for the legislature to alter the rule laid down in McCord v. People (supra).* * * * If the rule as to larceny by false pretense and by trick or device were made the same as the common-law rule that stealing property from a thief is the same crime as stealing from the true owner, we think this class of cases might be much more successfully dealt with. We know that a feeling prevails to some extent in the community that it is unjust that one offender should be punished and his co-offender obtain immunity. This feeling is absolutely unreasonable. Where one offender is punished and another escapes, there may properly be a feeling of dissatisfaction, but the dissatisfaction should not be because one man is in prison, but because the other man is out."

The order appealed from should be affirmed.

CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Order affirmed.

PRATT, HURST AND COMPANY, LIMITED, Respondent, v. EDWARD N. TAILER, as Executor and Trustee under the Will of THOMAS SUFFERN, Deceased, et al., Appellants.

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR DAMAGES CAUSED BY THIRD PARTY. A provision in a lease that the lessors shall not be liable to the lessee for damages caused by leakage of the roof unless they neglect to make the necessary repairs within a reasonable time after receiving a written notice of such leakage from the lessee, will not exempt them from liability for damages caused by leakage, although no notice was given, where the leakage was caused by their having permitted a third party to use the roof for purposes to which it was not adapted, thereby rendering it leaky and unsafe, to the knowledge of the lessors.

Pratt, Hurst & Co. v. Tailer, 114 App. Div. 574, affirmed.

(Argued November 13, 1906; decided November 27, 1906.)

APPEAL by permission, from an order of the Appellate Division of the Supreme Court in the first judicial depart-

ment, entered July 12, 1906, which reversed an interlocutory judgment of Special Term overruling plaintiff's demurrer to the second separate defense of the answer, sustaining defendants' demurrer to the second cause of action stated in the complaint and dismissing the complaint.

The following questions were certified :

"1. Does the second cause of action set forth in the complaint herein state facts sufficient to constitute a cause of action ?

"2. Is the second separate defense contained in the answer of the defendants herein insufficient in law upon the face thereof ?"

The facts, so far as material, are stated in the opinion.

Edward B. Whitney and *Winston H. Hagen* for appellants.

Under the leakage covenant it was plaintiff's duty to give the defendants written notice of the condition of the roof. (*Doupe v. Genin*, 45 N. Y. 119; *Idle v. Mitchell*, 158 N. Y. 134; *Thomas v. Kingsland*, 12 Daly, 315; 108 N. Y. 616; *Lenz v. Aldrich*, 6 App. Div. 178; *Boss v. Jarmulowsky*, 81 App. Div. 577; *Reiner v. Jones*, 3 Misc. Rep. 406; *Wolcott v. Sullivan*, 6 Paige, 117; 2 McAdam on Landl. & Ten. 1233, 1260; *Boden v. Scholtz*, 101 App. Div. 2; *Schwartz v. Monday*, 97 N. Y. Supp. 978; *Alperin v. Earle*, 55 Hun 211.)

Arthur L. Marvin and *Rollin M. Morgan* for respondent.

The exemption clause in the lease was not intended by the parties to absolve the landlord from liability for damage caused by his own acts. (*Mynard v. S., etc., R. Co.*, 71 N. Y. 180; *Holsapple v. R., etc., R. R. Co.*, 86 N. Y. 275; *Kenny v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 422, 425; *Jennings v. G. T. R. Co.*, 127 N. Y. 438; *Rathbone v. N. Y. C. & H. R. R. Co.*, 140 N. Y. 48; *Appleby v. E. C. S. Bank*, 62 N. Y. 14; *Allen v. W. S. Bank*, 69 N. Y. 314; *Kummel v. G. S. Bank*, 127 N. Y. 488; *Gearns v. B. S. Bank*, 135 N. Y. 557; *Levin v. Habicht*, 45 Misc. Rep. 381.)

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

WILLARD BARTLETT, J. The plaintiff corporation is a tenant of a loft in a building of which the defendants are landlords. In this suit the plaintiff seeks to recover the loss which it has sustained by reason of the leakage of water through the roof of the building, whereby its goods were damaged. In the first cause of action set out in the complaint it is alleged that the building was six stories high, and that each loft was separately leased and occupied by a separate tenant; that the elevators, stairs, hallways and roof remained in the possession of the landlords, and that the landlords, without the knowledge or consent of the plaintiff, made an agreement with the Holmes Electric Protective Company permitting that corporation to place and install wires, switchboard stations or other apparatus or appliances for a testing station upon the roof of the building, in consideration of which use the Holmes Electric Protective Company agreed to keep the roof in good order and repair. It is further alleged that the said Holmes Electric Protective Company did place and install certain wires, switchboards and stations on the roof and use the roof for the purpose mentioned, and that such use necessitated the presence of many workmen upon the roof and their walking thereon several times each week and for long periods, and that the roof was not constructed for or adapted to such use, and that such use was calculated to and did injure and damage the roof and cause it to be broken and cause holes to appear therein much sooner than would have been the case if exposed simply to the usual wear and tear and action of the elements. It is further alleged that the defendants well knew that the roof was not suitable or adapted to such use, and that it would be greatly injured thereby; that the Holmes Electric Protective Company negligently allowed the roof to become and remain worn and broken in consequence of such use thereof, and failed to repair the holes and breakage of which the defendants, their agents or servants had full knowledge, and that in consequence of the premises and the negligence of the defendants, their agents or servants, rain entered through the breaks or holes thus made and allowed to remain in the roof

and injured the plaintiff's goods to its damage in the sum of \$1,201.38.

By the second cause of action the plaintiff sought to recover the same amount as for a breach of a contract to repair contained in the lease. This cause of action set out substantially the same facts as those alleged in the first cause of action, but pleaded the terms of the lease in addition. In the lease the defendants were the parties of the first part and the plaintiff was the party of the second part. The only portion of the lease material to be considered upon this appeal is the following provision: "* * * it being understood that the parties of the first part shall keep the roof, sky and patent vault lights in order, but shall not be made liable to the party of the second part for any damage caused by leakage of the same, unless they shall neglect to make the necessary repairs within a reasonable time after receiving a written notice of such leakage from the party of the second part."

By their answer the defendants interposed a denial and two separate defenses. The second separate defense set up that part of the lease which I have quoted, and pleaded that no written or other notice of such leakage or of any defect, leak or lack of repair in the roof was received by the defendants from the plaintiff until after the rain storm which did the damage.

The defendants demurred to the second cause of action contained in the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the plaintiff demurred to the second separate defense contained in the answer on the ground that it was insufficient in law on the face thereof. At the Special Term the defendants' demurrer to the second cause of action was sustained and the plaintiff's demurrer to the second separate defense was overruled. In the Appellate Division the defendants' demurrer to the second cause of action was overruled and the plaintiff's demurrer to the second separate defense was sustained. In other words, the decision at Special Term was in favor of the defendants on both demurrers and the decision in the Appellate Division was in favor of the plaintiff on both demurrers.

The real question presented by the appeal is whether the facts stated in the complaint are sufficient to take the case out of that provision of the lease which declares that the landlords shall not be liable to the tenant for any damage caused by the leakage of the roof unless they neglect to make the necessary repairs within a reasonable time after receiving a written notice of such leakage. The contention of the plaintiff is that this provision has reference only to such leakage as might occur in consequence of the action of the elements and the usual wear and tear to which the roof would be subjected in its ordinary use and that it has no application to a case in which the roof has been injured and rendered leaky by the affirmative act of the landlords themselves or any one acting negligently with their sanction in occupying or using the roof. Of course, it is perfectly plain that the landlords would not be relieved of liability for leakage occasioned by their own action or that of their agents in actually making holes in the roof. It could not have been intended that they were to receive written notice in order to charge them with responsibility for their own personal misconduct or that of others which they authorized or sanctioned. It seems to me equally plain that they are not protected by this provision in the lease under such circumstances as are set out in this complaint where it appears that they permitted an occupation of the roof by another corporation for purposes which were likely to render it leaky and where they well knew that the roof was not suitable or adapted for the uses to which the corporation proposed to put it and that such use would greatly injure and damage the roof and cause it to wear out. It is alleged in the complaint, and must of course be taken to be true, that the defendants, their agents or servants had full knowledge of the use to which the roof was put by such corporation "and the condition of the said roof and of the holes and breakages therein, and in disregard of their duty to the plaintiff they negligently and carelessly suffered such use to continue and failed and omitted to have such breakages and holes mended and repaired." Here we have indeed an express

allegation that the defendants, their agents or servants had actual knowledge of the leaky condition of the roof. How then could it have been contemplated that a further written notice should be necessary in order to impose upon the landlords the obligation to repair?

I think the order of the Appellate Division was right and that it should be affirmed, with costs, and that both of the questions certified should be answered in the affirmative.

CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and HISCOCK, JJ., concur.

Order affirmed.

AUGUSTA G. GENET, Respondent, v. THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellant.

CONTRACT — LEASE FOR MINING COAL — AGREEMENT BY LESSEE TO PAY FIXED ROYALTY ON COAL OF DESIGNATED SIZE AND QUALITY — WHEN LESSOR IS ENTITLED TO ROYALTY ON COAL OF INFERIOR SIZE AND QUALITY. Where the lessee of coal lands agreed to pay a certain royalty per ton for all coal of a designated quality and size taken by it, the contract being silent as to payments for coal of inferior quality or smaller size, and it has been held in a previous action between the parties that "the lessee was not obliged to take coal of inferior size or quality, but it had the right to take such coal if it chose, in which case it was bound to pay royalty upon it the same as upon other coal;" the asportation of coal, of inferior size and quality, from the lands of the lessor to the lands of the lessee and mingling it with coal of similar size and quality owned by the latter, thereby exercising exclusive control and dominion over such coal and removing it beyond the power of the lessor to assert her ownership thereof, constitutes an exercise of the lessee's option to take all of such coal as marketable coal under the contract, so that the lessor is entitled to the payment of the royalty thereon.

Genet v. D. & H. Canal Co., 110 App. Div. 867, affirmed.

(Argued October 24, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 5, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank E. Smith for appellant. There has been no taking or appropriation of the culm heap or the coal contained in it. (*Parsons v. Parker*, 159 N. Y. 16; *Shaw v. Wallace*, 25 N. J. L. 455; *Murvin v. B. I. M. Co.*, 55 N. Y. 538.)

Learned Hand for respondent. The asportation of the culm across the Lackawanna river was an election to accept it under the contract. We do not claim that the mere mining of the culm constituted an election to accept it, as the defendant seeks to assume. (*Knatchbull v. Hallet*, L. R. [13 Ch. Div.] 696; *I. & T. Bank v. Peters*, 123 N. Y. 272; *Matter of Holmes*, 37 App. Div. 15; 159 N. Y. 532; *Blair v. Hill*, 50 App. Div. 33; 165 N. Y. 672.)

CHASE, J. On the 28th day of March, 1864, the plaintiff (her husband joining with her) made an agreement with the defendant by which she leased to it "all the coal contained in, on or under" certain real property at Scranton, Pennsylvania, therein described. That agreement and the work performed by the defendant in mining and marketing coal from said lands have been fruitful sources of litigation. Plaintiff and defendant have been wholly unable to agree upon a construction of the terms of the agreement or as to their respective rights in connection with the work of mining and marketing the coal under said agreement. Appeals from judgments in actions relating thereto have been repeatedly heard in this court and they are reported in 86 N. Y. 625; 113 N. Y. 472; 122 N. Y. 505; 136 N. Y. 593; 163 N. Y. 173; 167 N. Y. 608; 170 N. Y. 278.

The terms of said agreement are stated, so far as material, in the consideration of the question now before us in a report of the opinion at Special Term in one of the actions between the parties found in 13 Miscellaneous Reports, 409, and also in 122 N. Y. 505, and 136 N. Y. 593. It is quite unnecessary on this appeal to attempt to state in detail the history of the

litigation between the parties, or as to what has been decided in the several cases in this and other courts, except as the decisions have special reference to the question now involved.

When the agreement was executed, coal that would pass through a mesh one-half inch square was not sent to market, and for several years thereafter such coal was thrown upon the culm pile. The culm pile was then situated on the surface of the plaintiff's land. At a subsequent time smaller sizes of coal were taken from the culm pile and marketed by the defendant.

It appears from the opinion reported in 163 N. Y. 173 that the plaintiff claimed that under the agreement the defendant had no right to take any coal except such as would not pass over a half-inch mesh, and that the title to the smaller coal remained in her, and she brought an action to recover among other things the full value of such small coal. The value of such small coal exceeded the stipulated royalty of twelve and one-half cents per ton which the defendant was required to pay for coal that passed over such half-inch mesh. She recovered a judgment for its value in the Supreme Court. The judgment was modified in this court by reducing her recovery to an amount equal to twelve and one-half cents per ton for the small coal so taken by the defendant, and in construing the agreement this court said: "It will be seen that in the provision as to royalties already cited the lessee is required to pay 12½ cents a ton, not for all coal, but only for all 'merchantable' coal that will not pass through a half-inch mesh. Now, merchantable is not to be construed in its ordinary sense, for these parties have adopted a terminology of their own, and by the contract exactly defined the meaning of 'merchantable.' 'It is further mutually understood and agreed that the term 'merchantable coal' shall be understood and defined as follows, to wit: That all coal mined under this agreement shall be with the same expense of mining and cleaning, of as good quality as the average of coal taken from other mines and sent to market by the said party of the second part, and that it shall be subject to the inspection of the superintendent of the said party of the second part or

such other person as they may employ for that purpose whose decision as to quality of said coal shall be final and conclusive.' It is not only entirely possible, but very probable that at times large quantities of coal have been taken from these lands either not of as good quality as the average of the defendant's other coal, or if of as good quality, mined at greater expense than other coal. Yet, though the coal may have been of somewhat inferior quality or mined at somewhat greater expense than other coal, its mining may have been most profitable to the appellant. Still, under the contract, it would not be merchantable coal. No distinction can be drawn between the two provisions, one, that the coal shall not pass through a half-inch mesh, and the other, that it shall be merchantable. If the appellant's contention is correct, then on all this coal, profitable as its mining may have been, the defendant is exempt from the payment of royalty, while if the plaintiff's claim is to prevail, she was entitled to all this coal, and the defendant could take none of it, though its labor in mining and preparing coal had contributed probably nine-tenths of its value."

The court in that case discussed the provisions of the agreement relating to the defendant being relieved from further mining operations and then say: "They are merely privileges or options afforded the defendant of which it might avail itself or not as it saw fit. Mining might become unprofitable; but this of itself would not terminate the contract. The lessee, nevertheless, could still continue the prosecution of the work in the expectation that the situation would change, but if it did take out coal the obligation rested upon it to pay the royalty for it. The same is true, in our opinion, as to the provisions relating to the size and merchantable character of the coal. *The lessee was not obliged to take coal of inferior size or quality, but it had the right to take such coal if it chose, in which case it was bound to pay royalty on it the same as upon other coal.*"

It appears from the record that the purest coal contains about 90% of carbon, average coal about 84%, while coal to

be accepted in the market must contain at least 65% of carbon. Material containing from 40 to 65% of carbon is classified as bone, and when it contains less than 40% of carbon it is classified as slate or rock. All of the material taken from the plaintiff's land is not of the same richness in carbon, but some bone, slate and rock is mingled with the richer or purer coal. It is claimed by the plaintiff that all of the material so removed from her land is composed of the same ingredients and that it differs only in the proportion of carbon and other substances contained in it. Some portion of the inferior material passes through the breakers and it is mingled with the richer coal. It is accepted in the market so long as the average percentage of carbon in the marketed product is not materially affected.

The defendant mines coal from lands other than those included in the lease from the plaintiff, and coal so mined is taken from the mines underneath such other lands through tunnels from said lands to the opening or shaft on the plaintiff's land, where it is elevated to the surface of the ground and to the breakers, and the coal so taken from the land of the plaintiff and others respectively leased to the defendant and from the lands owned by the defendant are mingled in the breakers and each person interested obtains a statement of the amount of coal marketed from the lands in which he is so interested, by having the cars filled with coal from the lands so leased by them respectively tagged and counted and their proportion respectively of the full amount marketed is thus established by computation. The coal that passes through meshes now used by the defendant and inferior grades of coal and material denominated "pickings" from all the coal taken from the mines so mixed in the breakers is sent to and mingled in one culm pile and the interest of any person by reason of the ownership of a particular mine in such culm pile is established by proportion as is done with the coal that is actually sent to market.

Prior to 1892 the culm pile produced from the breakers used in connection with the shaft on the plaintiff's land was

upon the plaintiff's land and the culm from the coal taken from the plaintiff's land was a part only of the total amount in such culm pile. Since 1892 the defendant has taken the culm as produced across the Lackawanna river adjoining the land of the plaintiff and piled it onto lands owned by it. In this action the plaintiff claims to recover $12\frac{1}{2}$ cents a ton for all of the material taken from the mines in her property since 1892 less such amount as she has been paid on account therefor, and she insists that the defendant has exercised its option and accepted all of the coal mined as merchantable coal under the agreement and that as it has taken all of such material it must within the terms of said decision reported in 163 N. Y. 173, pay her therefor as merchantable coal.

The referee has found the number of mining cars of *coal* taken from the plaintiff's land in each of the years for which plaintiff claims to recover in this action, and he also finds that the defendant has mined and taken *coal* out of the plaintiff's land separating from it and leaving in the mine so far as practicable such rock or slate or other foreign substances as may be attached to or inclosed in the coal in the vein, or mixed with the coal in mining it and he also finds that the *coal* so separated from the rock or slate and other foreign substances is loaded into the cars and taken out of the mine, and he further finds: "The *coal* in the cars is then inspected and if it is found to contain more impurities than a certain proportion *fixed by the defendant*, some portion of the contents of that car is rejected and the miners' price for mining is reduced accordingly.

"The contents of the car are then emptied into the breaker and crushed and broken into smaller pieces which are separated into sizes, the bone (which is an inferior quality of coal and not separately salable or usable) and the slate or rock mined with the coal and picked out and they, with the coal that is too small to pass over a seven-sixteenths-inch mesh, become culm, which is carried by the defendant from the plaintiff's land over the Lackawanna river to the culm pile or dump *on the defendant's land where it still remains in*

possession of the defendant, except perhaps, seventy-five tons per day of the culm which are taken without selection at the breaker by screening over a one-quarter-inch shaker and carried to the furnaces and there used as fuel by the defendant under its boilers without other preparation while the other part of the contents of the mining cars is sent to market and sold by the defendant."

A part of the contents of the culm pile consists of coal having as large a percentage of carbon as the coal sent to market, but such part consists of particles that pass through the meshes that are used in selecting the coal for market. It is not disputed that such part of the culm pile amounts to at least 40% of the total quantity thereof, and that there is now a process by which it is practical to remove such 40% from the remainder of the culm pile. That part of the culm pile which would remain after removing the fine particles of coal as stated, contains some percentage of carbon and specimens of such culm taken at random from the pile were produced on the trial and they show from 35 to 70% of carbon.

There is evidence in the record tending to show that the culm pile as it now exists on the defendant's property is marketable at some price. The defendant did not keep the coal that passed through the meshes separate from the bone and slate that were thrown aside as pickings, but transported the same mingled with the culm from coal mined in other lands to a common pile on its own land.

There has been no suggestion to the plaintiff or otherwise that the plaintiff's rights in the culm pile would be or are in any way preserved, but it is evident that during the times mentioned in the complaint the culm was so transported by the defendant to its own lands under the claim that the defendant was the absolute owner thereof, by reason of the payment of 12½ cents per ton for the coal that had passed over a one-half-inch mesh.

Plaintiff was and is entitled to 12½ cents per ton for the coal which defendant accepts as merchantable, and any culm that it does not so accept is the property of the plaintiff.

N. Y. Rep.]

Statement of case.

The election or option which rests in the defendant to determine the quality of coal which it will accept under the contract should be exercised within a reasonable time in consideration of all the circumstances.

We are of the opinion that the defendant, by mingling the culm from the different mines, together with its taking unqualified possession and exercising full and exclusive dominion over the same, and in removing it beyond the power of the plaintiff to assert her ownership of the culm from the coal mined on her lands, has exercised its option in favor of taking all of the material mined as merchantable coal under the contract. There is at least some evidence in the record to sustain the findings of the referee, and also from which to find that the option has been exercised by the defendant in favor of taking all of the material mined as coal, and, as we have seen, it has been determined as between the parties that such taking entitles the plaintiff to payment of the royalty.

The judgment should, therefore, be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur; GRAY, J., absent.

Judgment affirmed.

WILLIAM C. BROADWELL, Respondent, v. JACOB D. CONOVER,
Appellant.

EVIDENCE — ERRONEOUS EXCLUSION OF TESTIMONY TENDING TO SHOW INCONSISTENCY OF PLAINTIFF'S CLAIM. Where the evidence in an action to recover an alleged indebtedness consists principally of the testimony of the parties, each testifying in support of his own claim, it is reversible error to exclude a letter written by the plaintiff to defendant several months after the indebtedness was claimed to have arisen, in which the defendant was requested to perform a service for the plaintiff for which the latter promised to pay him as soon as convenient, since the defendant should be allowed to urge before the jury the inconsistency of plaintiff's claim that he was indebted to him at the time alleged.

Broadwell v. Conover, 108 App. Div. 359, reversed.

(Argued November 26, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 6, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Junius R. Judson for appellant. The court erred in not admitting in evidence the letter from plaintiff to defendant. (*Sperry v. Miller*, 16 N. Y. 407; *Lake v. Tyson*, 6 N. Y. 461; *Strong v. Slicer*, 35 Vt. 40; *Webster v. Sibley*, 72 Mich. 630.)

George E. Warner for respondent.

CHASE, J. The plaintiff by his complaint alleges in substance that he is the inventor of a safety pin; that the defendant agreed to pay him \$1,000 for such invention as soon as the same was patented, and that the patent has been granted but that the defendant has failed to make such payment.

The defendant by his answer denies the allegations of the complaint relating to the invention and his promise to pay the plaintiff \$1,000 therefor. On the trial the evidence relating to the contract consisted principally of the testimony of the plaintiff and defendant, each in his own behalf.

It appears from the record that the safety pin was patented in the name of the defendant on the 4th day of September, 1900. Plaintiff testified that in October, 1900, he asked the defendant for money, and that the defendant replied that "He had been to a great deal of expense in advertising and one thing and another and he was not in a position to do anything just then; that he would do as he agreed with me."

Plaintiff wrote the defendant a letter on May 26th, 1901, in regard to the defendant's having his lawyer get a patent on a certain hook and eye, and waiting until it was convenient for him to pay to the defendant the expense of obtaining such patent. The letter was offered in evidence,

N. Y. Rep.]

Opinion of the Court, per CHASE, J.

but it was objected to by the plaintiff as immaterial, incompetent and irrelevant. The objection was sustained and the defendant took an exception. Plaintiff recovered a judgment, and it is claimed by the defendant that the rejection of the letter was error that requires that the judgment be reversed. The letter is as follows: "Since you were here, I have thought of the proposition you made me on the hook and eye, and, if you will do what you said I will send you the samples of the different ideas and write out my claims. You can have your lawyer go ahead and get the patent as soon as possible. You know the proposition you made me. You said you would get the patent and I could pay you at any time most convenient for me. Now, if you will do this, write and let me know, and as soon as I hear from you I will send the samples. I can make a machine to make the hook and eye, and if I can get a patent on them I should like to have you handle them for me, or perhaps we can fix it in some other way. We will talk of that later. I think it the handiest little thing there is, and it will be a great seller, it is so simple and easily applied. I suppose you are always glad to hear how the Capsheaf pins are coming along? Well, I have made an improvement on the guard that will please you. Will illustrate it on paper you find inside; there will be no crooks or roughness where the guard is bent around the pin. Say nothing to Wallace about it, and when I send samples of the hook and eye I will send you some pins."

Without expressing any opinion as to the weight to be given to the letter in deciding the question of fact between the plaintiff and defendant, we are of the opinion that the letter should have been received in evidence, and that the defendant should have been allowed to urge before the jury that the plaintiff's request to have the defendant get the patent on the hook and eye, coupled with his promise to repay to the defendant the expense thereof at a time convenient for him, is inconsistent with his claim that the defendant had for about nine months been his debtor to the extent of \$1,000. If the defendant was then in a position to advance the money neces-

sary to obtain a patent to the plaintiff on the hook and eye, the defendant should have been allowed to urge that the plaintiff would naturally have suggested in his letter that a payment be made to him on account of the \$1,000, so that the plaintiff could himself bear the expense incident to obtaining the patent, or that the defendant pay, or become liable to pay, the expense thereof and credit the same on account of the indebtedness then existing from the defendant to the plaintiff. (*Sperry v. Miller*, 16 N. Y. 407.)

As the evidence in this case consists principally of the testimony of the parties each in support of his own claim, it is a substantial error to exclude any testimony that has a legitimate bearing upon the weight to be given to the testimony of the parties respectively relating to the alleged indebtedness.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ., concur; O'BRIEN, J., absent.

Judgment reversed, etc.

JAMES TSCHETINIAN, Appellant, v. CITY TRUST COMPANY OF
New York, Respondent.

BONDS — WHEN TRUST COMPANY, ACTING AS TRUSTEE FOR MORTGAGE BONDS, NOT LIABLE AS GUARANTOR OF BONDS BY REASON OF STATEMENT INDORSED THEREON. Where a trust company, as the trustee under a corporation mortgage, indorsed upon the back of each one of a series of bonds the statement that "This bond is one of a series of bonds mentioned and described in the mortgage within referred to," and the bonds so certified were each indorsed by the mortgagor as a "First Mortgage Bond," whereas in fact they were not such, being subsequently cut off by the foreclosure of a first mortgage, such statement does not upon any reasonable construction, in the absence of any fraud or deceit, active or passive, make the trustee a guarantor of the quality and extent of the security given by the mortgage, or responsible for the accuracy of statements indorsed upon the bond by the mortgagor purporting to describe the nature of such security.

Tschetinian v. City Trust Co., 110 App. Div. 916, affirmed.

(Argued October 25, 1906; decided December 4, 1906.)

N. Y. Rep.]

Opinion of the Court, per HISCOCK, J.

APPEAL from a judgment, entered December 21, 1905, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which affirmed a judgment of Special Term sustaining a demurrer to the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

William R. Barricklo for appellant. The certificate constitutes a guaranty. (*P. E. of T. Co.*, 31 Nat. Corp. Rep. 369; *McClure v. C. T. Co.*, 165 N. Y. 108; *Motan v. McLarty*, 75 N. Y. 25; *Bunnell v. Stern*, 122 N. Y. 544; *McS. Co. v. Padian*, 142 N. Y. 207; *Imperial Co. v. Jewett*, 169 N. Y. 143; *Industrial Co. v. Todd*, 180 N. Y. 215; *Page v. Krekey*, 137 N. Y. 307; *Miles v. Roberts*, 76 Fed. Rep. 919.) Defendant is liable for negligence in issuing the certificate. (*McClure v. C. T. Co.*, 165 N. Y. 108; *Elmer v. T. G. & T. Co.*, 156 N. Y. 10; *Thomas v. Winchester*, 6 N. Y. 397; *W. U. T. Co. v. Nat. Bank*, 65 L. R. A. 805; *Elwood v. W. U. T. Co.*, 45 N. Y. 549; *Rittenhouse v. I. T. Co.*, 44 N. Y. 265; *Page v. Krekey*, 137 N. Y. 312; *Chapman v. Rose*, 56 N. Y. 141; *F. Nat. Bank v. Dean*, 137 N. Y. 110; *Morange v. Mix*, 44 N. Y. 315.) Defendant is liable for negligence in its fiduciary capacity. (*Williams v. McKay*, 40 N. J. Eq. 189; *Williams v. Reilly*, 41 N. J. Eq. 137; *Chapman v. Rose*, 56 N. Y. 141; *McClure v. C. T. Co.*, 165 N. Y. 108.) Defendant is liable for fraud. (*Bishop v. Davis*, 9 Hun, 342; *Haddock v. Osmer*, 153 N. Y. 604; *Meyer v. Amidon*, 23 Hun, 553; *Bennett v. Judson*, 21 N. Y. 238; *Nevada Bank v. Portland Bank*, 59 Fed. Rep. 338; *Shotwell v. Mali*, 38 Barb. 445; *Lynch v. M. T. Co.*, 18 Fed. Rep. 486; *Bank v. Byer*, 139 Mo. 627.)

A. B. Boardman for respondent.

HISCOCK, J. This action, as evidenced by the complaint, sought to hold defendant responsible for the value of cer-

tain bonds purchased by plaintiff which became valueless. It was based upon a certificate made by defendant, as mortgage trustee under a corporation mortgage, upon an issue of \$100,000 of bonds which included those purchased by the plaintiff. This certificate was indorsed upon each bond, and read as follows: "This bond is one of a series of bonds mentioned and described in the mortgage within referred to." The bonds so certified were each indorsed by the mortgagor as a "First Mortgage Bond," whereas in fact they were not such, being subsequently cut off by the foreclosure of a first mortgage.

Plaintiff claims that defendant's certificate was broad enough to be a guaranty that they were first mortgage bonds. The Appellate Division has decided that the facts stated in the complaint do not sustain this view, and we concur in the conclusion thus reached by that court.

In addition to the facts already stated by way of introduction, reference may be made to a few others. The United States Carbonate Company executed to defendant, as trustee, a mortgage upon certain real estate and other property to secure the issue of bonds above mentioned. These bonds were issued in the denomination of \$500 each. The prior mortgage amounted to \$15,000, and, when subsequently foreclosed, absorbed practically all of the proceeds of the property covered by the mortgage securing the bonds in question. Plaintiff had purchased twenty of these bonds, which were thus rendered valueless.

His counsel advances various reasons for sustaining the sufficiency of his complaint against the attack of the demurrer which are not at all based upon the allegations of the complaint, and, therefore, need not be considered.

The complaint itself contains some allegations against the sufficiency of the mortgage given to secure the bonds, which are conclusively contradicted and qualified by the terms of the mortgage and bonds which are made a part of the complaint. For instance, it is alleged "that said bonds were not secured by a first mortgage or any other mortgage upon the property

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

and franchises of the United States Carbonate Company." This allegation is utterly at variance with the terms of the mortgage, and this contention seems to have been abandoned.

It is also alleged that at the time of the execution of the mortgage the mortgagor owned valuable franchises, etc., which were not included in any mortgage to the defendant as trustee, "although the said bonds purported to be secured by a mortgage to the defendant as trustee of all the property and franchises of the company." In opposition to this allegation each of the bonds in its body sets forth that it is secured by the mortgage in question, and makes express reference to said mortgage for a description of the property and franchises mortgaged, etc., thus by reference specifically indicating the nature and extent of the property conveyed.

There is no allegation in the complaint that the defendant was in any manner a party to or responsible for having the indorsement upon the bonds that they were first mortgage bonds, or that it in any manner was guilty of fraud or misrepresentation in connection with said statement or that it suppressed any knowledge or in fact knew that said bonds were not first mortgage bonds. Upon the other hand, it is to be noted as bearing upon this point that the resolutions passed by the mortgagor, authorizing the execution of the mortgage and bonds, expressly provided that the proceeds thereof should be applied to the payment and satisfaction of any existing indebtedness of the company. If this resolution had been complied with the prior mortgage would have been retired when the bonds were issued and the latter would have been in reality first mortgage liens.

Therefore, we are presented with the narrow question whether the defendant, solely on account of the certificate which it placed upon the bonds, should be held to have guaranteed the nature and extent of the security therefor, because the mortgagor had placed upon them a statement purporting to be descriptive of the latter. This, of course, involves a consideration of the terms of the certificate which the defendant executed, for plaintiff's complaint is based upon nothing

else. As already indicated, we think that it would be unreasonable to impose upon defendant any such liability. The language employed when interpreted in its natural and ordinary meaning simply amounts to a statement identifying the bond whereon it is written as one of those mentioned in the mortgage, and the effect of this is an assurance to the purchaser that his bond is amongst those entitled to the benefits and protection afforded by such mortgage. But the statement does not upon any reasonable construction, in the absence, as in this case, of any allegation of fraud or deceit, active or passive, make the trustee a guarantor of the quality and extent of the security given by the mortgage, or responsible for the accuracy of statements indorsed upon the bond by the mortgagor purporting to describe the nature of such security. This is as plain upon a mere reading of the certificate as it could be made by any extended argument or reasoning. There is involved the construction of very few and simple words, and we could not reach the views urged by plaintiff through any justifiable course.

It is not necessary to consider various clauses found in the mortgage and referred to by defendant as exempting it from liability as a trustee. Some of those clauses manifestly refer to duties entirely different from those which would arise in connection with this certificate, and we do not intend to determine how far such clauses might serve to relieve a trustee like defendant from liability otherwise incurred. It is sufficient for the purposes of this case to determine as we do that the certificate upon which plaintiff's claim to a cause of action must rest does not sustain that claim.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER and CHASE, JJ., concur; GRAY, J., absent; WILLARD BARTLETT, J., not sitting.

Judgment affirmed.

THE REPORTERS' ASSOCIATION OF AMERICA, Respondent,
v. THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Appellant.

1. LIBEL — WHEN CORPORATION MAY MAINTAIN ACTION FOR LIBEL. A corporation, like a natural person, has the right to maintain an action of libel when the publication assails its management or credit and inflicts injury upon its business or property, and an averment of specific damage is not necessary when the language is of so defamatory a nature as to directly affect credit and to occasion pecuniary injury.

2. SAME — WHEN ALLEGED LIBELLOUS STATEMENTS ARE NOT LIBELLOUS PER SE. Where it is stated in a newspaper article that a domestic corporation, engaged in the collection and distribution of news items and the publication of a magazine, has exchanged subscription lists with other concerns organized for the same purpose because the canvassers have always seemed to hit on the same easy marks and that the concerns are "beggars" for subscriptions and aid each other in soliciting them through the exchange of lists which show what persons have been successfully approached by each, such statements are not libellous *per se*, and they are not made such because the same article charged that persons connected with another news and magazine company were "grafters" and had "police records," where there is no other association of the plaintiff with the latter company, nor other implication of similarity in practices and police repute, than what may be found from both having been spoken of in the course of the same article.

3. SAME — PLEADING — INSUFFICIENT ALLEGATION OF SPECIAL DAMAGE CAUSED BY ALLEGED LIBEL. An allegation of a complaint in an action brought by a corporation, engaged in the collection and distribution of news and the publication of a magazine, against a newspaper for the publication of an alleged libel, that such publication "has caused to this plaintiff a serious loss in business, the refusal by clients to pay the just claims due by contract, and has greatly damaged the plaintiff in credit and reputation," is insufficient as an allegation of special damage in that it fails to state such damage with such particularity that the defendant may be enabled to meet the charge, and the complaint is demurrable, therefore, upon the ground that it fails to state facts sufficient to constitute a cause of action.

Reporters' Assn. v. Sun Printing & Pub. Assn., 112 App. Div. 246, reversed.

(Argued November 12, 1906; decided December 18, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April

6, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint.

The plaintiff brings this action to recover damages for an alleged libelous publication in the *Sun*, a newspaper published in the city of New York by the defendant. The complaint alleges that the plaintiff is a domestic corporation, engaged in the collection and distribution of news items and the publication of a magazine. It sets forth the following matter as having been published in the *Sun*, "concerning the Newsboys' Company and Newsboys' Magazine," namely:

"Roosevelt called police,—and got back his letter from *Newsboy* employees.—Blue Pencil Grafters have exchanged mendicancy for peddling certificates of stock in philanthropic plant.—\$250,000 to sell.— Watch your check book."

"Chief Sylvester made a careful examination of the Newsboys' Company and had its agents shadowed all over the country."

"That many in the concern, among them a woman, had police records."

"The chief of police probably has these records still."

It is then alleged that in the same article the following appeared, namely:

"Washington has been fruitful of checks until this, but thereafter the activity was transferred to this city. The beggars have been busy here ever since. Subscription lists seem to have been exchanged among the 'Press Artists' League,' the 'Reporters' Association of America,' 'The Interstate Press,' and a score of other concerns organized for the same purpose, because the canvassers have always seemed to hit on the same easy marks. One lawyer's check-book shows that since last March he has received visits from representatives of all these concerns."

The innuendo in the complaint is "that the mention of the plaintiff in the publication was made with the malicious intent to defame it" and to lead the public to believe that it was engaged in the same practices as the article had mentioned in connection with the Newsboys' Company. It is then, further,

alleged that the publication is wholly false "and has caused to this plaintiff a serious loss in business, the refusal by clients to pay the just claims due by contract and has greatly damaged the said plaintiff in credit and reputation, all in the sum of one hundred thousand dollars (\$100,000)."

The defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. At the Special Term the demurrer was overruled and, upon appeal to the Appellate Division, that order was affirmed. The affirmance was by a divided court and, thereafter, leave was given to appeal to this court; this question of law being certified to us: "Does the amended complaint state facts sufficient to constitute a cause of action?"

Franklin Bartlett for appellant. The plaintiff is a domestic corporation, and without proper averment of special damage no corporation can maintain an action for libel, unless the complaint shows that the alleged libel directly affects the plaintiff's credit or financial standing, and necessarily occasions pecuniary injury. (*S. H. C. Co. v. N. E. N. Assn.*, 69 L. T. [N. S.] 844; *Williams v. Beaumont*, 10 Bing. [N. C.] 260; *M. O. Co. v. Hawkins*, 4 H. & N. 90; *L. H. S. Assn. v. Egerton*, 57 L. T. [N. S.] 770; *T. C. F. Co. v. Mussam*, 42 L. T. [N. S.] 851; *Mayor, etc., v. Williams*, 63 L. T. [N. S.] 805; *A. S. S. Co. v. Bennett*, 73 Hun, 81; *U. A. Press v. Heath*, 49 App. Div. 247; *M. F. A. Co. v. Shields*, 68 App. Div. 88; *S. Mfg. Co. v. D. S. M. Co.*, 49 Ga. 70.) A criticism of methods of soliciting business is not libellous *per se*, either when published of an individual or of a corporation. (*A. B. Co. v. Gates*, 85 Fed. Rep. 729; *King v. S. P. & P. Assn.*, 84 App. Div. 310.) The amended complaint contains no proper averment of special damage, because it contains no sufficient allegation of facts, and the special damage must always be fully and accurately stated. (Newell on Slander & Libel, 634, 635, § 49; *Shipman v. Burrows*, 1 Hall, 399; *Linden v. Graham*, 1 Duer, 670; *Tobias v. Harland*, 4 Wend. 537; *Roberts v. Breckon*, 31 App. Div. 436; *Loftus v. Bennett*,

68 App. Div. 131; *Lynch v. Knight*, 9 H. L. Cas. 577; *Morris v. Langdale*, 2 B. & P. 284; *Terwilliger v. Wands*, 17 N. Y. 54; *Vicars v. Wilcocks*, 8 East, 1; *Walker v. Best*, 107 App. Div. 307.)

A. P. Backman for respondent. The publication is libelous *per se*, and no allegation of special damage is necessary. (Townshend on Libel, 471; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 215; *Gates v. N. Y. R. Co.*, 155 N. Y. 228; *Cruikshank v. Gordon*, 118 N. Y. 178; *Triggs v. Sun*, 179 N. Y. 144; *Bornmann v. Star Co.*, 174 N. Y. 219; *Mattice v. Wilcox*, 147 N. Y. 632; *Morey v. M. J. Assn.*, 123 N. Y. 207; *Moore v. Francis*, 121 N. Y. 199; *Morrison v. Smith*, 177 N. Y. 369.) The innuendo of the complaint is warranted, properly alleged and within the scope of reasonable interpretation. (*Chumberlain v. Vance*, 51 Cal. 75; *Beardsley v. Tappan*, 1 Blatchf. 588; *Andrews v. Woodmanse*, 15 Wend. 232; *Van Vechten v. Hopkins*, 5 Johns. 211; *Vaughan v. Havens*, 8 Johns. 109; *Morrison v. Smith*, 177 N. Y. 369.) If the publication is not libelous *per se* the amended complaint sufficiently avers special damages in its fourth allegation. (*N. Y. N. Pub. Co. v. S. S. Co.*, 148 N. Y. 39; *T. Ins. Co. v. Perrine*, 3 Zab. 402.)

GRAY, J. The sufficiency of this complaint depends upon its allegation of the special damage, which the plaintiff claims to have sustained from the alleged libellous publication. That a corporation has the right to maintain an action of libel, when the publication assails its management, or credit, and inflicts injury upon its business, or property, is a proposition, which is true upon principle and which has the support of authority. (See Newell on Slander and Libel, p. 360 and cases cited.) It is as much entitled to the protection of the law, in those respects, as is the natural person. It differs from the latter, in that it has no character to be affected by a libel; but its right to be protected against false and malicious statements, affecting its credit, or property, should be beyond

question. There has been some dispute in the cases as to the necessity of setting out the specific damage, which a corporation claims to have suffered from a libellous publication; but I regard the better rule to be that such an averment is not necessary, when the language is of so defamatory a nature as to directly affect credit and to occasion pecuniary injury. (See *Shoe & Leather Bank v. Thompson*, 18 Abb. Pr. 413; *Knickerbocker L. Ins. Co. v. Ecclesine*, 2 J. & S. 76; *Union Assoc. Press v. Heath*, 49 App. Div. 247; *Trenton, etc., Ins. Co. v. Perrine*, 23 N. J. L. 402.) In the present case, the learned justices of the Appellate Division are in accord that this publication is not libellous *per se* and, as I think, correctly. It may well be that the Newsboys' Company and Newsboys' Magazine, which are spoken of in the earlier part of the article, might complain of its language; but, as it was observed below, "what is said with respect to the Newsboys' Magazine as to 'grafters' and 'police,' and 'police records,' cannot be said to legitimately refer to this plaintiff." There is no other association of this plaintiff with the Newsboys' Company and Magazine, nor other implication of similarity in practices and in police repute, than what may be found from both having been spoken of in the course of the article, and it would be going further than common sense allows to infer from that circumstance a necessary connection in disreputable practices. The portion of the article referring to the plaintiff, clearly, is not libellous *per se*. What does it import to say that "subscription lists seem to have been exchanged among the 'Press Artists' League,' the 'Reporters' Association of America,' 'The Interstate Press' and a score of other concerns organized for the same purpose, because the canvassers have always seemed to hit on the same easy marks," except that the concerns are "beggars" for subscriptions and aid each other in soliciting them, through the exchange of lists which show what persons have been successfully approached by each. It has not been considered injurious to a person's character, or to his credit, that he has importuned for business and it will not, I believe, be so considered

for a business corporation to do so. By reference to the record in *King v. Sun P. & P. Co.*, (84 App. Div. 310; affd., 179 N. Y. 600), to which counsel for the appellant calls our attention, it will be seen that we affirmed an order, sustaining a demurrer to a complaint, where the libellous article related to plaintiff's efforts to procure subscriptions for, and to effect sales of, the publication of a work of art and to his general business as a publisher. It was much more severe in personal allusions than the present article; but it was not considered libellous *per se* and the discussion in the courts was upon the sufficiency of the allegations of special damage.

The disagreement of the Appellate Division, in this case, was upon the question of the special damage alleged. That special damage must be alleged, the article not being libellous *per se*, was conceded; but the dissent was from the opinion that the allegation was sufficient, that the publication etc. "has caused to this plaintiff a serious loss in business, the refusal by clients to pay the just claims due by contract and has greatly damaged the plaintiff in credit and reputation." Under the settled rule, whenever special damage is claimed, the plaintiff must state it with particularity, in order that the defendant may be enabled to meet the charge. (1 Chitty on Plead. 414; Newell on Slander & Libel, 634; *Linden v. Graham*, 1 Duer, 670; *Bassil v. Elmore*, 65 Barb. 627; *Cook v. Cook*, 100 Mass. 194.)

In *Linden v. Graham*, (*supra*), it was said of an action of slander, (and the same rule would apply), that "the special damage must be fully and accurately stated. If the special damage was a loss of customers * * * the persons who ceased to be customers, or who refused to purchase, must be named; and that, if they are not named, no cause of action is stated. (1 Selden, 14; *Kendall v. Stone*)." In *Tobias v. Harland*, (4 Wend. 537), the slanderous words were spoken of articles manufactured by the plaintiff, whereby divers persons refused to purchase them. It was held that "the general allegation of the loss of customers is not sufficient to enable the plaintiff to show a particular injury," (English cases

being cited), and the demurrer was sustained. In Chitty's Pleading, (*supra* *p. 424), it is said "the general rule is that when the law infers damage and the words are actionable, without special damage, none need be laid in the declaration; but that it is otherwise when the words are only actionable in respect of the particular injury resulting therefrom," and the rule is pertinently illustrated by the author. The reason for the rule should be quite obvious. If the article complained of is not defamatory of itself, damage is not implied in law. But if the plaintiff, nevertheless, charges that damage has actually occurred, as the result of the publication, then he should aver what it was and with such particularity as that it shall appear to be the legal, natural and proximate, if not the necessary, consequence of the article. (*Terwilliger v. Wands*, 17 N. Y. 54.) If that were not true, no legal cause of action would be shown. Furthermore, particularity in such a case is both proper and necessary; because the facts must be peculiarly within the plaintiff's own knowledge and the defendant should have notice of the cause of complaint, to be prepared to meet it. (1 Chitty on Pl. *857.)

The damage charged in this complaint is a loss in business from the refusal of clients to pay just claims due upon contract. That, however, is, in effect, a statement that the loss was occasioned by the wrongdoing of a third person and, therefore, it cannot be the legal and proximate result of the defamation. For a contract debtor to refuse payment of his indebtedness is an illegal act, for which the law affords a complete remedy by an action; in which a full indemnity is presumed. A breach of contract is an illegal act and it could not be regarded as the legal consequence of the alleged libelous article. (*Kendall v. Stone*, 5 N. Y. 14.) To allege the loss of some particular contract, or the business of some certain persons, would charge a specific damage, as the consequence of the publication of the article, which the defendant could prepare to meet upon the trial of the issue. There is that vagueness of language as to the clients, which was condemned in *Linden v. Graham*, (*supra*).

For these reasons I think this complaint failed to state a sufficient cause of action, according to the rules of pleading, which have been laid down in the books and which commend themselves as being reasonable.

I advise, therefore, that the question certified be answered in the negative; that the order and judgment appealed from be reversed and that the defendant have judgment dismissing the complaint, with costs in all the courts; but with leave, however, to the plaintiff, within twenty days from service of the order and upon payment of the costs, to amend its complaint.

CULLEN, Ch. J., HAIGHT, VANN and WERNER, JJ., concur; HISCOCK, J., concurs on ground last stated in opinion; WILLARD BARTLETT, J., not sitting.

Ordered accordingly.

POLLY BUTLER, Respondent, v. THE VILLAGE OF OXFORD,
Appellant.

NEGLIGENCE — WHEN VILLAGE NOT LIABLE FOR PERMITTING SLIGHT DEFECT IN SIDEWALK. Where it appears, that at the junction of a stone and dirt sidewalk in an incorporated village, the surface of the former walk was higher than that of the latter by about two and one-half inches in the center and by about five inches at the edge of the walk, it must be held that this was too slight a defect to sustain an action against the village for negligence in behalf of a traveler who had stumbled over the projecting edge and was injured.

Butler v. Village of Oxford, 101 App. Div. 611, reversed.

(Argued November 16, 1906; decided December 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 17, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Hubert C. Stratton and *Millard C. Loomis* for appellant. The defect complained of was so slight and so unimportant in

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

character that it was not negligence for the defendant not to have discovered it and if discovered not to have repaired it. (*Beltz v. City of Yonkers*, 148 N. Y. 67; *Corson v. City of New York*, 78 App. Div. 481; *Getzoff v. City of New York*, 51 App. Div. 450; *Whalen v. C. G. Co.*, 151 N. Y. 70; *McInerney v. City of Elmira*, 11 App. Div. 354; *Grant v. Town of Enfield*, 11 App. Div. 358; *Weston v. City of Troy*, 139 N. Y. 281; *McGuire v. Spencer*, 91 N. Y. 303; *Salisbury v. City of Ithaca*, 94 N. Y. 27; *Seymour v. Village of Salamanca*, 137 N. Y. 364.)

W. B. Matterson and Harry J. Mosher for respondent. The question of defendant's negligence was for the jury. (*Mullins v. Siegel, Cooper & Co.*, 183 N. Y. 129; *Durr v. N. Y. & H. R. R. Co.*, 184 N. Y. 320; *Rogers v. City of Rome*, 96 App. Div. 434; *Fordham v. Gouverneur*, 160 N. Y. 541; *O'Brien v. City of Syracuse*, 31 App. Div. 328; *Williams v. City of Brooklyn*, 33 App. Div. 540.) The fact that no one had ever fallen at the place where the plaintiff fell does not preclude a recovery, but is simply a fact to be considered by the jury with other facts in the case. (*Lloyd v. Village of Walton*, 57 App. Div. 288; *Bradner v. Village of Warwick*, 91 App. Div. 408.) The defendant was bound to exercise active vigilance toward keeping its streets and sidewalks in proper repair, and under the evidence in this case it became a question of fact for the jury as to whether the authorities had discharged the obligation imposed upon them under the law or not. (*Pomeroy v. Vil. of Saratoga*, 101 N. Y. 459; *Williams v. City of Brooklyn*, 33 App. Div. 541.)

HISCOCK, J. The plaintiff recovered a judgment against the defendant for alleged negligence in permitting to exist a slight difference in surface level between a stone sidewalk and an adjoining dirt walk, she having stumbled against the more elevated edge of the stone walk. We disagree with the decisions of the learned courts below that this judgment

should be allowed to stand, and think that it should be reversed.

Originally a canal ran through a portion of the village of Oxford. In time this was filled up, and, within certain limits, appropriated to use as a public street. At the point where plaintiff's accident happened business buildings had been constructed upon one side of the street, and in front of one or more of them a stone sidewalk had been laid. This walk in one direction terminated at a building which was known as the "laundry," and from that point on there was only a dirt walk. Immediately beyond the termination of the stone walk was a driveway leading from the street in question across the dirt walk to the rear of the buildings mentioned. The surfaces of the stone and adjoining dirt sidewalk were not flush at their junction, the surface of the former rising above that of the latter by a distance of about two inches and a half in the center and about five inches upon the outer edge of the walk.

Plaintiff had been in attendance upon a circus, and in the evening, when it was dark and rainy, approached over the dirt walk toward the stone one, and in some manner stumbling against the projecting edge of the stone fell and met with her accident. There were electric lights in the vicinity, which threw their light upon the stone and enabled plaintiff to see it and observe that she was approaching and would soon be upon it.

There not only was no evidence that anybody else had ever stumbled at this point, but, upon the other hand, there was evidence of the use of this walk by a large number of people at about the same time when plaintiff fell, and also of general use by the public at other times without any resulting accident.

The general principles which govern the liability of a municipality in such an action as this are perfectly well settled. It is not an insurer and is not expected to maintain walks and streets in such an absolutely perfect condition as to render an accident impossible, but is expected to use reasonable care and prudence in detecting and remedying any defect which it might be fairly anticipated would be dangerous and

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

liable to cause an accident. As is frequently the case, the only difficulty arises in applying these general principles to specific facts and in determining whether within them a given situation does or does not present actionable negligence.

Weighing the facts here presented, we think it would be altogether too burdensome a rule if we should allow a village like this defendant to be held liable for so insignificant a defect as is here complained of. The nature of the street and the use of the driveway crossing the walk made it quite natural that the stone walk should not be continued beyond the point where it terminated. This being so, there was nothing in the slight difference of grade between the stone and the dirt which reasonably should arouse apprehension of danger to travelers. The photographic exhibits submitted for our inspection make this even more apparent than the evidence. In the center of the walk where people would be the more apt to pass, the difference in grade was so slight as scarcely to be noticeable, and although some attempt was made to establish a caving away of the dirt under the end of the stone, this failed and there was no opportunity for catching the foot and tripping in that way. Ordinary observation teaches us that it would be practically impossible by the expenditure of any reasonable amount of money to prevent the existence in a municipality of such trifling imperfections as this one. As a matter of necessity, in the construction of walks much greater obstructions very commonly exist at curbs, gutters and crosswalks, and it would have required a much higher degree of foresight than the law imposes upon the part of the village authorities to have foreseen the danger of accident to a passer-by. It is a matter entitled to some consideration that the situation complained of was not the result of breakage or wear which had impaired the original condition of the walk, and which fact of itself sometimes quite strongly suggests the inference of negligence. Then too the opinion which it must be assumed the village authorities held that this situation was not dangerous, was confirmed by the experience of the public in using the walk. While of

Opinion of the Court, per HISCOCK, J.

[Vol. 186.]

course the absence of any prior accident at this point would not be conclusive evidence that the construction was a proper one, it still is of much importance in establishing that proposition and in relieving the trustees from any imputation of negligence because they did not change it. They had a right to take into account and be influenced by the experience of the general public in using this walk without any mishap.

Our conclusions thus expressed seem to us to be in line with and sustained by what was decided and written in *Beltz v. City of Yonkers* (148 N. Y. 67); *Hamilton v. City of Buffalo* (173 N. Y. 72); *Getzoff v. City of New York* (51 App. Div. 450); *Corson v. City of New York* (78 App. Div. 481).

The *Beltz* and *Hamilton* cases have been so often referred to and cited as to render unnecessary a statement of the evidence upon which it was held in each case as a matter of law that the municipality was not guilty of negligence. It is true that in each of those cases the accident happened in the day time, but as in neither of them was the decision based upon the ground of contributory negligence, that fact is not controlling. Upon the other hand, the court fairly took the position in each case that a hole in a sidewalk caused by wear and breakage between two and three inches deep and several inches in area, was too slight a defect to sustain an action for negligence. While the elevation of the stone above the dirt in the present case was somewhat greater at some points than the depth of the holes in the above cases, this difference is not sufficient to distinguish it from them. And it is to be noted that, as it seems to us, the present case is stronger than those two and others above-cited in the respect already referred to, that in this case there was not as in each of those a deterioration from the original condition of the walk through wear and breakage which might suggest neglect and liability.

In the *Corson* case the plaintiff's heel slipped on the edge of a piece of flagging which was higher than the adjoining one by 2½ inches, as the jury might have found, and it was held that the defect was too inconsiderable to have imposed

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

upon the authorities the duty of repair even in so large a municipality as Brooklyn.

In *Getzoff v. City of New York* the plaintiff fell because her foot went into a hole in the sidewalk which was three inches deep, there being no satisfactory testimony as to its area size. This hole was the result of a break in a flagstone. It was, however, held that the defect was a slight one from which danger could not be reasonably anticipated.

Upon the other hand, we think the case can fairly be distinguished from those of *Mullins v. Siegel-Cooper Co.* (183 N. Y. 129); *Fordham v. Gouverneur Village* (160 N. Y. 541); *Durr v. N. Y. C. & H. R. R. Co.*, (184 N. Y. 320) and *Williams v. City of Brooklyn* (33 App. Div. 539), which are especially relied upon by the plaintiff.

In the *Mullins* case heavy teaming across a sidewalk had loosened one flagstone so that it rested upon, and was thereby raised three inches above the level of, the adjoining walk. Against this obstruction the plaintiff stumbled. This was a clearly defective condition which had been brought about after the walk was laid, and which was not a natural condition or incident to its original construction. It strikes the mind at once that a person proceeding along the walk would be more apt to stumble and fall over this obstruction than would one coming towards the stone walk in the case at bar be apt to stumble at the slight change of grade which might easily be anticipated. In addition, in the *Mullins* case the dangerous character of the defect had been made evident by persons stumbling over it before the accident.

In the *Fordham* case some plank between one and two inches thick had been laid upon the walk of a bridge which before had a smooth surface, no light or signal being placed there to indicate that repairs were in process. It was held, reasonably enough as it seems to us, that these planks constituted temporary and wholly unexpected and inexcusable obstructions upon what had been a smooth surface, and that accidents might reasonably be expected therefrom was demon-

strated by evidence that other people than the plaintiff had stumbled and fallen.

In the *Durr* case there was an oblong hole or depression several inches deep by the side of a plank at a crossing of a railroad by a highway, and the hole was of such a character that a person's foot was liable to catch under the edge of the plank, which was just what did happen to the plaintiff. It is obvious that this was a situation very different from and much more dangerous than that which plaintiff encountered.

In the *Williams* case an isolated flagstone had been left near the middle of the sidewalk, being several inches higher than the latter. Some of the witnesses placed its height above the adjoining walk from five to seven inches. There was also evidence that other people than the plaintiff had fallen over the stone and that the attention of a policeman had been called thereto. This manifestly was a very different case from the present one.

Much space might be occupied in reviewing other cases referred to by the respective counsel, but it is hardly worth while to do this. Each case must necessarily depend upon its particular features, and we have deemed it sufficient to compare the present one with some of the leading authorities cited to our attention for the purpose of making it plain by reference to them that this case is not one where the municipality should be held liable.

The judgment should be reversed and a new trial granted, with costs to appellant to abide event.

CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur.

Judgment reversed, etc.

MULFORD MARTIN et al., Respondents, v. THE BABCOCK & WILCOX COMPANY, Appellant.

LEASE — COVENANT FOR RENEWAL. Where under the provisions of a lease for a term of years the lessee agreed within two years to make certain improvements to the leased property which when made were to belong to the premises, or in lieu thereof to erect a new building in place of the old, the said lessee to be entitled upon performance of the covenants and agreements contained in the lease to a renewal thereof at its expiration, said renewal to contain a covenant that "in case there shall be standing on the premises a * * * building erected by the" lessee, then the lessors or their successors at the expiration of the second lease would, at their option, either purchase the building at a valuation to be ascertained or grant a new lease for a third term for a specified rental, the said lessee, who elected to make the improvements specified rather than erect a new building and who has otherwise performed all of the conditions of the first lease, cannot be required at its expiration to accept a renewal from which the covenant for a third renewal is omitted, upon the theory that it was not intended to be operative unless the lessee had erected a new building upon the premises within the first two years of the original term, but is entitled to have such covenant included.

Martin v. Babcock & Wilcox Co., 109 App. Div. 16, reversed.

(Argued November 22, 1906; decided December 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 2, 1905, in favor of plaintiffs upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

The nature of the controversy and the facts, so far as material, are stated in the opinion.

John J. Delany and *Frederick St. John* for appellant. The provisions of the original lease, as to the covenants of renewal to be contained in the second lease, are plain and unambiguous and do not necessitate a construction thereof by the court. (*Westcott v. Thompson*, 18 N. Y. 367.) The defendant was neither bound to elect nor to exercise any option. (*O. A. Society v. Waterbury*, 8 Daly, 35.)

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.]

Charles Gibson Bennett for respondents. At the end of the first term on May 1, 1905, the defendant had lost finally and absolutely the right to erect a new building on the demised premises, and consequently it had lost the right to a second lease containing a clause giving a right to a further renewal in case such a building should be standing on the premises at the end of the second term. As the right depended upon a contingency which could never legally happen, the right did not exist and no provision in respect of it was necessary or proper in the second lease. (*Ripley v. Yarmouth*, 56 Barb. 21; *O. Asylum v. Waterbury*, 8 Daly, 35.)

WILLARD BARTLETT, J. The plaintiffs' predecessors in title, being the owners of a lot of land in the city of New York known as No. 29 Cortlandt street, with an adjacent gore fronting on Church street, on April 29, 1893, executed to the defendant corporation a lease of the premises from May 1st, 1893, for a term of twelve years, at a yearly rent of nine thousand dollars. That lease contained an agreement on the part of the lessee "that it will within two years from the date hereof erect upon the said premises a new store front on the first story of Cortlandt and Church Streets with windows in the side on Church Street and put in an elevator and generally put the building into condition for office occupation and that it will expend on these improvements on the said building a sum not less than twenty-five thousand dollars which improvements when made will belong to the premises, or in lieu thereof will erect a new modern fireproof store and office building."

Within two years from the date of the lease the lessee did erect upon the demised premises a new store front on the first story of Cortlandt and Church streets, with windows in the side on Church street, and put in an elevator and generally put the building into condition for office occupation, and it expended on these improvements a sum not less than \$25,000. It has never, however, erected a new modern fireproof store

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

and office building or any new building upon the premises. In other words, it has exercised the option given to it by the provision which has been quoted from the lease by making the improvements therein specified at an expense of not less than \$25,000 instead of erecting a new modern fireproof store and office building upon the leased property.

It further appears by the terms upon which the controversy has been submitted that the lessee corporation has always fully kept and performed all the other covenants and agreements in the said lease contained on its part and behalf during the whole of the demised term.

Following that portion of the original lease which has been quoted in reference to the option to be exercised within two years, the instrument contains a covenant for a renewal of the lease for a further term of thirteen years after the expiration of the first term; and it is this provision which has given rise to the present controversy. By the terms thereof the party of the second part (the lessee) having kept all its covenants during the first term, and having made the alterations and repairs in the building provided for in the lease, became entitled to a new lease from the successors in interest of the original lessors for the same annual rental for a further term of thirteen years, "such lease to contain the like covenants as hereinbefore contained, except the foregoing covenant for renewal, *in lieu whereof said second lease shall contain a covenant that in case there shall be standing on the premises a modern fireproof store and office building, erected by the party of the second part*, that then the parties of the first part, their executors, administrators or assigns, will, at their option, either purchase said building at a valuation thereof to be ascertained as herein provided or grant a new lease for a third term of twenty-one years, to commence from the expiration of the said second term, at a rent of five per cent upon the appraised value of the ground, payable quarter-yearly, to be ascertained as hereinafter provided, and to contain the like covenants, conditions and provisos as shall have been contained in said second lease, except that said third lease shall

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.

contain a covenant that the parties of the first part will, at their option, either purchase the building then upon the said premises at a price to be ascertained as hereinafter provided or grant a further lease for a term of twenty-one years to commence from the expiration of the said last term at the ground rent of five per cent upon the appraised value as aforesaid, to be ascertained as hereinafter provided, at the end of which term the building upon the said premises shall belong to the parties of the first part, their heirs, executors, administrators or assigns."

At the expiration of the first term the plaintiffs tendered to the defendant a new lease for thirteen years, from which was omitted the covenant provided for by the language just quoted. The defendant refused to accept or execute the lease in this form insisting that it was entitled to the insertion of the covenant which had been omitted. A majority of the justices of the Appellate Division have held that the defendant is not entitled to the insertion of this covenant inasmuch as it was not intended to be operative unless the lessee had erected a modern fireproof building upon the premises within the first two years of the original term; and upon this conclusion it has rendered a judgment requiring the defendant to accept the new lease without such covenant.

I am unable to perceive how the conclusion of the Appellate Division can be sustained, unless the court exercises the power to make a contract for the parties essentially different from that which they have chosen to make for themselves. The original lease provides in unmistakable language that the renewal to be given at the end of the first term upon the fulfillment of conditions by the lessee which have unquestionably been performed, shall contain a certain express covenant. This covenant has been deliberately omitted from the new lease which the owners of the property now offer to the lessee. Upon what principle of law can the lessee be required to accept an instrument which is not in accordance with the contract pursuant to which it is assumed to be given? The consequences of the insertion in the renewal lease of the cove-

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

nant which the original lease expressly provided should be contained therein need not be inquired into at this time. It is sufficient for the solution of the present controversy that there exists a distinct and positive agreement that such covenant should be contained in the renewal lease. The only renewal lease which the lessee is under any obligation to accept or execute is one in which that covenant shall appear. It seems to me that the undisputed existence of the agreement in the original lease that such covenant shall form a part of the renewal lease precludes the landowners from insisting upon the acceptance of any renewal lease from which it is omitted, and, indeed, renders it their legal duty to execute and deliver a renewal lease in which that covenant shall be included. This view of the case simply calls upon the landowners to perform the letter and spirit of the original agreement entered into by their predecessors in title.

It may be observed, however, that even if the court possessed the power practically to disregard the express terms of the original lease and hold that the omitted covenant might properly be left out of the renewal lease, because there could be no subject-matter liable to its operation, it is, nevertheless, by no means clear that the view to this effect expressed in the opinion of the Appellate Division is correct. In that opinion it is declared that the covenant provided for in the renewal lease, that in case there should be standing on the premises a modern fireproof store and office building erected by the lessee, then the landlords shall offer to purchase said building at the valuation or grant a new lease for a third term of twenty-one years, "was dependent upon the tenants having erected a new building during the first term, and that it was not intended to give to the tenant an option during the second term to erect a new building." This proposition overlooks the last covenant contained in the original lease, and which it is conceded must be contained in any renewal, which covenant is in these words: "And the party of the second part also covenants and agrees to keep the building now upon said premises, or such as shall hereafter be erected upon said premises,

insured in such Fire Insurance Companies as may be approved by the parties of the first part, in the sum of not less than Thirty thousand dollars (\$30,000), and to assign the policies to the party of the first part as security for replacing any building that may be destroyed by fire; and the parties of the first part hereby covenant and agree that the said insurance, when paid, shall be applied for such purposes."

Under this covenant, in the event of fire destroying all the structures now upon the premises the lessee would undoubtedly have the right to erect a modern fireproof store and office building thereon. (*Rice v. Culver*, 172 N. Y. 60, 65.) In that event they would bring themselves within the terms of the omitted covenant entitling them to have the building purchased at a valuation or to receive a new lease for a third term of twenty-one years.

I think that the judgment of the Appellate Division should be reversed, and that judgment should be directed in favor of the defendant in accordance with the terms of the submission, with costs in both courts.

CULLEN, Ch. J., GRAY, VANN and HISCOCK, JJ., concur;
HAIGHT and WERNER, JJ., dissent.

Judgment accordingly.

CATHERINE BEETSON, Appellant, v. MARIE E. STOOPS,
Respondent, Impleaded with Others.

WILL — ACCEPTANCE OF BENEFIT UNDER WILL INVOLVES RENUNCIATION OF RIGHTS INCONSISTENT WITH INSTRUMENT. Where a testator devises a parcel of real estate owned by him to one of his grandchildren, and assumes to devise to the other grandchild a parcel in which he has but a life interest and which is owned by the grandchildren as tenants in common, the devisee cannot accept the devise, with knowledge of all the facts, without being precluded from asserting a claim to the other parcel attempted to be devised, and, therefore, cannot maintain an action to partition the same.

Beetson v. Beetson, 108 App. Div. 366, affirmed.

(Argued December 6, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 24, 1905, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

George H. Taylor, Jr., and *Albert J. Appell* for appellant. The doctrine of election does not apply to the facts of this case, because it appears that Andrew Moll, at the time of the execution of the will in question, had a then present interest of his own in the premises, to which, under our law, his attempted devise thereof must be held to apply. (*Havens v. Sackett*, 15 N. Y. 369; *Beal v. Miller*, 1 Hun, 390; 2 Story's Eq. Juris. § 1089.) The doctrine of election has no application here, because it does not appear expressly or by implication that the plaintiff, accepting the devise to her of the Seventh avenue property, is required as a condition of such acceptance to relinquish to the defendant Marie Stoops plaintiff's interest in the premises in Twenty-second street, of which partition is sought. (*Walker v. Taylor*, 15 App. Div. 457; *Shanley v. Shanley*, 22 App. Div. 375; *Beetson v. Stoops*, 91 App. Div. 192.)

Henry Wetherhorn for respondent. The plaintiff elected to take the Seventh avenue premises under the will of Andrew Moll and thereby relinquished all her right, title and interest in and to the Twenty-second street premises, which thereby became the sole property of the defendant. (Story's Eq. Juris. [13th ed.] 1075-1077, 1082; 2 Jarman on Wills [5th Am. ed.], 1-43; Bisph. Prin. Eq. [5th ed.] 295-306; *Havens v. Sackett*, 15 N. Y. 365; *Chipman v. Montgomery*, 63 N. Y. 221; *Haack v. Weicken*, 118 N. Y. 67; *Shanley v. Shanley*, 22 App. Div. 375; 34 App. Div. 172; *Persons v. Snook*, 40 Barb. 144; *Hawley v. James*, 16 Wend. 61; *Blumer v. Blumer*, 2 Bradf. 339; *Weeks v. Patten*, 18 Me.

42; *Smith v. Guild*, 34 Me. 443; *Morrison v. Bowman*, 29 Cal. 337.)

CHASE, J. Andrew Moll and Kathrina Moll were husband and wife and resided in the city of New York. They had one child, their only heir at law, who died leaving two children, the plaintiff and the defendant Stoops, then small girls, who after the death of their father resided with their grandparents, the said Andrew and Kathrina Moll. Andrew Moll was the owner in fee simple absolute of the real property at 177 Seventh avenue in the city of New York, and Kathrina Moll was the owner in fee simple absolute of the real property at 267 West 22nd street in the city of New York. On the 28th day of June, 1887, Kathrina Moll died intestate seized of said real property on West 22nd street. The title to said real property descended to her said grandchildren in equal shares, subject to the life estate of Andrew Moll, her husband. Said grandchildren continued to reside with their grandfather and he retained the possession of said real property on 22nd street. On the 4th day of February, 1902, Andrew Moll was living on said 22nd street property and on that day he died seized of the Seventh avenue property. He left a will dated the 15th day of February, 1900, by which he directed that his debts, funeral and testamentary expenses be paid. The will then provided :

"*Second.* I hereby give, devise and bequeath unto my dear grand-child, Catherina Margaretha Moll, born at New York City, July 24th, 1881 (Plaintiff), the house and lot known as Number One Hundred and seventy-seven (177) Seventh (7th) Avenue * * * (describing it), and to her heirs and assigns forever absolutely.

"*Third.* I hereby give, devise and bequeath unto my dear grand-child, Marie Emma Moll, born at New York City, March 1st, 1883 (defendant Stoops), the house and lot now known as number Two hundred and sixty-seven (267) West Twenty-second (22nd) Street * * * (describing it), and to her heirs and assigns forever absolutely."

By the will the testator expresses the wish that each of said grandchildren will keep the real property so given to them until they attain the age of twenty-six years, and he then gives to said grandchildren, in equal shares, the rest, residue and remainder of his estate. The said two pieces of real property were each worth twenty-four thousand dollars. Neither Andrew nor Kathrina Moll owned any other real property, and the personal property of the said Andrew Moll was about sufficient to pay his indebtedness and the expenses of administering his estate. The will of Andrew Moll was probated and thereupon the plaintiff claimed the title and ownership of the Seventh avenue property, under the will of Andrew Moll, deceased, and took and has retained the exclusive possession of the same. She then brought this action to partition the Twenty-second street property, and alleges in her complaint that she is the owner of an undivided one-half interest therein, and that the defendant Stoops is the owner of an undivided one-half interest therein, and she further alleges that she owns no other lands as tenant in common with her sister, the defendant Stoops, and she demands judgment for the partition and sale of the Twenty-second street property, and that it be decreed that said Andrew Moll was never seized of the premises in Twenty-second street, and that he had no right or authority to devise the same or any part thereof. The defendant Stoops invokes the rule in equity that where a testator assumes by his will to devise property owned by him, and also other property not owned by him; that the person to whom is devised the property owned by such testator cannot accept such devise, with knowledge of all the facts, without being precluded from asserting a claim to other property devised by the same instrument. No question arises in this court relating to an election by the plaintiff, because the counsel for the plaintiff stated upon the argument that if the plaintiff be required to elect she will accept the Seventh avenue property and renounce all interest in the Twenty-second street property.

The language used by the testator in devising real property

to his grandchildren is exactly the same in each case, and there is no doubt or uncertainty as to the testator's intention. The plaintiff argues, however, that the testator was in possession of the Twenty-second street property as a tenant for life, and, consequently, at the time of making the will he had an interest in such property. A will speaks from the death of the testator. The testator's life estate in the Twenty-second street property ceased at the very moment when the will took effect. He did not have an interest in the real property that survived his death, and it could not be transferred by will. It is clear that the testator did not make his will with the mistaken and absurd idea that he could transfer his life estate to his grandchild, for the language of the will itself is unmistakable evidence of the testator's intention to give to the defendant Stoops the fee simple absolute of the Twenty-second street property. The facts to which the equitable doctrine of election applies are clearly established.

The equitable rule invoked by the defendant has been followed by the courts for centuries, and it is thoroughly established in England and in this country. It was provided in Justinian's Institutes (Lib. 2, tit. 20, sec. 4) that a testator may not only bequeath his own property or that of his heir but also the property of others; and if the thing bequeathed belongs to another the heir can be obliged either to purchase and deliver it or to render the value of it if it cannot be purchased. The section, however, provided that it should be understood to mean that the bequest could be made if the deceased knew that what he bequeathed belonged to another, and not if he was ignorant of it. It would seem, however, by reference to the Roman Digest (Lib. 31, 1. 67, sec. 8) and the Code (Lib. 6, tit. 42, 1. 25 and lib. 6, tit. 37, 1. 10) that a bequest made upon an erroneous supposition that the subject belonged to the testator would not be void if the legatee stood in a certain degree of relationship to the testator or the subject was the property of the heir. The Code Napoleon substantially recognizes the rule but reversed it by providing in section 1021 of said Code that "where a testator shall have

bequeathed an object belonging to another the legacy shall be annulled whether the testator were aware or not that it did not belong to him." The rule was early adopted in England and it is there held, as it is in this country, that it does not make any difference in its application whether the testator at the time of making his will erroneously supposed that he owned the property bequeathed or knew that it belonged to another. The rule in England was stated by Lord ERSKINE in *Thellusson v. Woodford* (13 Ves. 209), as follows:

"The jurisdiction, exercised by this Court, compelling election, may be thus described. A person shall not claim an interest under an instrument without giving full effect to that instrument, as far as he can. If, therefore, a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all, that is the subject of his will, mixes in his disposition property, that belongs to another person, or property, as to which another person has a right to defeat his disposition, giving to that person an interest by his Will, that person shall not be permitted to defeat the disposition, where it is in his power, and yet take under the Will. The reason is the implied condition, that he shall not take both; and the consequence follows, that there must be an election; for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property unless in the manner intended by the testator. * * * without reference to the circumstance, whether the testator had any knowledge of the extent of his power, or not: nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another: it is enough to say, he had such intention; and the Court will not speculate upon what he would have done in the different cases put: if the instrument is such as to indicate, what the intention was, the only question is, did he intend the property to go in such a manner: not, whether he had power to do so, and would have done it, had he known, he could not without a condition imposed upon another person: whether he thought

he had the right, or, knowing the extent of his authority, intended by an arbitrary execution of power to exceed it, no person, taking under the will, shall disappoint it."

The rule is well stated by Mr. Swanston in his notes to *Dillon v. Parker* (1 Swans. 359) from one of which I quote: "The owner of an estate having in an instrument of donation, applied to the property of another, expressions which, were that property his own, would amount to an effectual disposition of it to a third person, and having by the same instrument disposed of a portion of his estate in favor of the proprietor whose rights he assumed, is understood to impose on that proprietor the obligation of either relinquishing (to the extent at least of indemnifying those whom, by defeating, the intended disposition, he disappoints), the benefit conferred on him by the instrument, if he asserts his own inconsistent proprietary rights, or if he accepts that benefit, of completing the intended disposition by the conveyance in conformity to it of that portion of his property which it purports to affect. The foundation of the doctrine is still the intention of the author of the instrument; an intention which, extending to the whole disposition, is frustrated by the failure of any part; and its characteristic, in its application to these cases is, that by equitable arrangement effect is given to a donation of that which is not the property of the donor; a valid gift, in terms absolute, being qualified by reference to a distinct clause, which, though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition (though destitute of legal validity), not express but implied, annexed to the benefit proposed to him. To accept the benefit, while he declines the burden, is to defraud the design of the donor. The doctrine of election, in common with many other doctrines of our courts of equity, appears to be derived from the civil law."

In a note to the first American edition of Coke upon Littleton (Vol. 1, page 525), it is said: "The doctrine of election, in equity, is chiefly applicable to cases where a devisee or

N. Y. Rep.]

Opinion of the Court, per CHASE, J.

legatee claims under, and also against the will. There have been numerous cases on this subject, the result of which appears to be, that a person shall not claim an interest under an instrument, without giving full effect to that instrument, as far as he can. This rule has been said to be universal and without exception."

The decisions of the English courts, affecting said rule, since the publication of the note by Mr. Swanston, have been very numerous and approve the rule with substantial unanimity.

Our Court of Chancery, in *Leonard v. Crommelin* (1 Edwards' Ch. Rep. 206), says: "It is an elementary principle, upon which the doctrine of election is founded, that a person shall not claim an interest under one instrument (either deed or will, for it applies to both) without giving full effect to it as far as he can, and renouncing any right to property which would defeat the disposition (*Thellusson v. Woodford*, 13 Ves. 220), or, to use Lord ROSSLYN's words, as quoted in *Moore v. Butler* (2 Sch. & L. 267), 'no person puts himself in a capacity to take under an instrument without performing the conditions of the instrument, and the conditions may be express or implied.'"

This court, in *Havens v. Sackett* (15 N. Y. 365) refers to the rule as a well-established rule of the courts of equity, which may be expressed in these terms: "One who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. For example, if a testator has affected to dispose of property not his own, and has given a benefit to the person to whom that property belongs, the legatee or devisee accepting the benefit so given to him must make good the testator's attempted disposition. If he insist on retaining his own property which the testator has attempted to give to another person, equity will appropriate the gift made to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of his rights. If the parties have done nothing to conclude

themselves, and the court will not consider anything done in ignorance of their rights as binding them, the party whose property has been given to another will be put to his election, either to take what is offered to him in the instrument, yielding up to the party who would otherwise be disappointed, his own property, or to keep what was his own, abandoning the provision made for him in the instrument."

The rule is referred to with approval in *Chipman v. Montgomery* (63 N. Y. 221); *Haack v. Weicken* (118 N. Y. 67), and in many other cases. It has been approved and stated in the Federal courts (*Peters v. Bain*, 133 U. S. 670, 695), and in Arkansas (*Fitzhugh v. Hubbard*, 41 Ark. 64); Georgia (*McGinnis v. McGinnis*, 1 Ga. 496); Illinois (*Van Schaack v. Leonard*, 164 Ill. 602); Indiana (*Moore v. Baker*, 4 Ind. App. 115); Kentucky (*Huhlein v. Huhlein*, 87 Ky. 247); Maryland (*Hyatt v. Vanneck*, 82 Md. 465); Missouri (*Keene v. Barnes*, 29 Mo. 377); North Carolina (*Isler v. Isler*, 88 N. C. 581); Ohio (*Hibbs v. Union Cent. Life Ins. Co.*, 40 Ohio St. 554); Pennsylvania (*Zimmerman v. Lebo*, 151 Pa. St. 345); West Virginia (*Bennett v. Harper*, 36 W. Va. 546), and other states.

The rule does not rest so much upon presumptions as upon the general principles of right, justice and fair dealing. Its general application and the foundations upon which it rests are stated in Pomeroy's Equity (3rd ed. vol. 1, sec. 461, etc.) and also by most of the other writers on equity.

Equity requires in this case that the plaintiff give effect to the provision of the will giving the Twenty-second street property to her sister, the defendant Stoops, and the judgment in favor of said defendant is right and should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ., concur.

Judgment affirmed.

TIMOTHY FINN, Plaintiff, v. CARL C. SMITH et al., Defendants, GEORGIANNA S. CONKEY, Respondent, and THE MOHAWK VALLEY LUMBER COMPANY, Appellant.

MECHANIC'S LIEN — INSUFFICIENT NOTICE OF LIEN. A notice that a lien is claimed on the property described therein for \$5,589.60, "being the value and agreed price of certain materials furnished and to be furnished, to wit: Timber, lumber," etc., is fatally defective under the Mechanics' Lien Law, in that it fails to state explicitly or by plain inference the value or the agreed price of the labor performed or materials furnished at the time of the filing thereof.

Finn v. Smith, 107 App. Div. 630, affirmed.

(Argued December 10, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 11, 1905, which affirmed a judgment of Special Term canceling of record a mechanic's lien.

The facts, so far as material, are stated in the opinion.

H. V. Borst and *George C. Stewart* for appellant. The notice of lien in question contained a sufficient compliance with subdivision 4, section 9 of the Lien Law. (*Gilmore v. Colcord*, 183 N. Y. 342.) The statute should be construed literally. (*Hall v. Dennerlein*, 29 N. Y. S. R. 67; *Ogden v. Alexander*, 140 N. Y. 356.) The statements contained in a lien, to render it void or ineffectual, must not only be untrue, but willfully and intentionally false in some important or material respect. (*Ringle v. W. I. Works*, 149 N. Y. 439; *White v. Livingston*, 69 App. Div. 377; *Aeschlimann v. Pres. Hospital*, 165 N. Y. 296; *N. J. S. & I. Co. v. Robinson*, 85 App. Div. 517.)

P. R. Chapman for respondent. The notice does not comply with the Lien Law, and is, therefore, ineffectual to charge the property. (*McKinney v. White*, 15 App. Div. 423; *N. J. S. & I. Co. v. Robinson*, 85 App. Div. 512; 178 N. Y. 632;

Bradley-Currier Co. v. Pacheteau, 71 App. Div. 148; 175 N. Y. 492; *Toop v. Smith*, 87 App. Div. 241; *Bossert v. Happel*, 89 App. Div. 7; *Armstrong v. Chisholm*, 100 App. Div. 440; *Villaume v. Kirchner*, 85 N. Y. Supp. 377; *Siegel v. Ehrshowsky*, 92 N. Y. Supp. 733; *Alexander v. Hollender*, 106 App. Div. 404.)

Per Curiam. In this case, which is an action to forelose a mechanic's lien, the Special Term held that the notice of lien filed by the appellant was fatally defective, in that it failed to state the amount of the materials actually furnished at the time of filing the notice, and the agreed price or value thereof. The only statement in the appellant's notice of lien is that the appellant claims a lien on the property described therein "for five thousand five hundred and eighty-nine dollars and sixty cents (\$5,589.60), being the value and agreed price of certain materials *furnished and to be furnished*, to wit: Timber, lumber," etc. When the lien was filed the value of material actually delivered for the construction of the building was only \$2,661.29. The trial court found that the amount of the lien was not exaggerated by the appellant willfully or intentionally. Despite of such finding we are of opinion that the decision of the trial court, that the lien was invalid, was correct, and that under the statute any notice of lien must state either explicitly or by plain inference the value or the agreed price of the labor performed or materials furnished at the time of filing thereof. It was so held by the Appellate Division of the first department in *Bradley & Currier Company v. Pacheteau* (71 App. Div. 148) and *New Jersey Steel & Iron Company v. Robinson* (85 App. Div. 512), and both cases were affirmed by this court. (175 N. Y. 492; 178 N. Y. 632.) It is true that in the opinion delivered in the later case of *Gilmour v. Colcord* (183 N. Y. 342) there is found the expression that "nothing was decided that would warrant the court in holding that the notice of lien in the present case was defective," but the decision proceeded on the ground that there was no sufficient exception to the decision

N. Y. Rep.]

Statement of case.

of the trial court. The case is not to be considered as overruling the prior decisions of this court.

It follows that the judgment appealed from must be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ., concur; O'BRIEN, J., not voting; CHASE, J., not sitting.

Judgment affirmed.

JOHN McCARG, Respondent, v. JOHN W. BURR, Appellant.

FALSE IMPRISONMENT — CONVICTION FOR MISDEMEANOR BY A JUSTICE OF THE PEACE PROCEEDING WITHOUT JURISDICTION. Where, upon a complaint charging cruelty to animals in the town of Mayfield, Fulton county, a justice of the peace of the city of Gloversville issued a warrant of arrest making it returnable before himself instead of before a justice of the town of Mayfield, as he was required to do by section 151 of the Code of Criminal Procedure, and the defendant objecting to the legality of the warrant and to the jurisdiction of the justice to try him, is subsequently convicted, his objection having been overruled, such magistrate is properly held liable for damages in an action of false imprisonment, since in proceeding with the trial he did not commit a mere error in ruling with respect to his jurisdiction, but was proceeding wholly without jurisdiction.

McCarg v. Burr, 106 App. Div. 275, affirmed.

(Argued December 11, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 12, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material are stated in the opinion.

N. H. Anibal for appellant. The justice acting as a Court of Special Sessions had in the first instance exclusive jurisdiction to hear, try and determine the complaint charging that in the town of Mayfield, Fulton county, N. Y., the plaintiff had been guilty of cruelty to animals. (Code Cr.

Pro. § 56, subd. 27.) The fact that the warrant issued by the defendant did not contain a direction that the defendant therein, this plaintiff, be brought before a justice of the peace of the town in which the offense was committed, did not deprive the defendant herein, as such justice, of the jurisdiction to hear, try and determine the charge against the plaintiff. (*Jones v. Foster*, 43 App. Div. 33; *People ex rel. Lotz v. Norton*, 76 Hun, 7; *People v. McLaughlin*, 57 App. Div. 454; *People ex rel. Gun v. Webster*, 75 Hun, 278; *People v. Olmstead*, 74 Hun, 323; *People v. Carter*, 88 Hun, 304.) The defendant as justice had jurisdiction over said charge and in trying and determining the same acted judicially, and for any decision rendered therein he is not liable to plaintiff. (*Austin v. Vrooman*, 128 N. Y. 229; *Handshew v. Arthur*, 9 App. Div. 175; *Marks v. Townsend*, 97 N. Y. 590; *Novak v. Waller*, 31 N. Y. S. R. 458, 459; 132 N. Y. 590; *Lange v. Benedict*, 73 N. Y. 12; *Ayers v. Russell*, 50 Hun, 282; *Gilbert v. Satterlee*, 101 App. Div. 313; *Rush v. Buckley*, 61 Atl. Rep. 774; *Brooks v. Mangan*, 49 N. W. Rep. 633; *Robertson v. Parker*, 75 N. W. Rep. 423.)

Eugene D. Scribner for respondent. The warrant was illegal and void. (Code Crim. Pro. § 151.) The arrest of the defendant therein named under said warrant, the same being a void process, was illegal and conferred no jurisdiction whatever upon the defendant herein. (Code Cr. Pro. §§ 151, 164, 166.) Courts acting beyond or without jurisdiction will not be protected and are liable to the party injured in an action for damages. (Cooley on Torts, 416; *Bigelow v. Stearns*, 19 Johns. 39; *Reynolds v. Orris*, 7 Cow. 69; *Blythe v. Tompkins*, 2 Abb. Pr. 468; *McKelvey v. Marsh*, 63 App. Div. 369.)

GRAY, J. The action was brought to recover damages for false imprisonment. The defendant was a justice of the peace of the city of Gloversville and, as such, had issued a warrant for the arrest of the plaintiff upon a complaint of

cruelty to animals, in violation of section 655 of the Penal Code. The depositions, upon which this warrant was issued, showed that the offense had been committed "within the limits of the town of Mayfield, in the County of Fulton;" a town not a portion of, nor adjoining, the city of Gloversville. The warrant directed the plaintiff to be brought before the defendant and the plaintiff, having been arrested and when arraigned before the defendant for trial, objected to the proceedings and moved for his discharge from arrest, upon the grounds, among others, that the alleged offense was committed in the town of Mayfield; that the warrant was illegal and void and that the court had no jurisdiction to try him. His objections were overruled and the trial proceeded before the defendant, with the result that, having been found guilty, he was sentenced to pay a certain fine and to be imprisoned in default of the payment thereof. The judgment of conviction was, subsequently, reversed upon appeal to the County Court and, thereafter, the present action was brought; in which the plaintiff has succeeded in recovering, and in thus far upholding, a judgment against the defendant.

This appeal presents the one question for our review, whether the defendant, by the issuance of this warrant of arrest, acquired jurisdiction over the plaintiff. If there was authority for it, I think that the defendant, in determining to proceed with the cause, acted judicially and that any error in that respect would not subject him to a civil action.

By the charter of the city of Gloversville, justices of the peace were vested with the same powers, duties and jurisdiction as if the city were a town in the county; but it was provided "that they shall have no jurisdiction in any criminal action or proceeding or special proceeding of a criminal nature, other than a bastardy proceeding, * * * within said city, except as otherwise provided herein in the case of the absence or inability or disability of the recorder." (L. 1899, ch. 275, sec. 35.) Section 56 of the Code of Criminal Procedure, by subdivision 27, provides that Courts of Special Sessions, except in the city and county of New York and the city of Albany,

have exclusive jurisdiction to hear and determine charges of misdemeanors for cruelty to animals and children. Section 151 of the Code of Criminal Procedure prescribes the form of the warrant of arrest, which a magistrate must issue, when satisfied that a crime has been committed, and provides that "the warrant must direct that the defendant be brought before the magistrate issuing the warrant, or, *if the offense was committed in another town, and is one of which a court of Special Sessions has jurisdiction to try, or which a magistrate has jurisdiction to hear and determine, he must direct that the defendant be brought before a magistrate of the town in which the offense was committed.*"

The source of the defendant's authority was in this statute and that only authorized him, in issuing the warrant to arrest the alleged offender, to direct him to be arraigned before a magistrate of the town of Mayfield. The Court of Special Sessions, over which the defendant presided, was a court of limited jurisdiction; whose powers were prescribed by the statute. The charter of the city gave no jurisdiction in criminal cases, except in the event of the absence or inability of the recorder of the city, and section 151, above cited, expressly deprived the magistrate, issuing the warrant, of jurisdiction to arraign, or try, the offender. The defendant, therefore, in proceeding under the provisions of section 151 to issue the warrant, was restricted to the performance of a mere ministerial act. He was not called upon to exercise any judgment upon the matter, after issuing the warrant. Having no authority to direct that the plaintiff be brought before him, the warrant was invalid and void, and the defendant acted, subsequently, without jurisdiction. He, thereby, rendered himself liable as a trespasser upon the plaintiff's rights. (*Bigelow v. Stearns*, 19 Johnson, 39; *Reynolds v. Orvis*, 7 Cowen, 269.) It behooved him, in taking cognizance of the offense complained of, to look into the provisions of the statute and, had he done so, his lack of jurisdiction would have been apparent.

The objection of the plaintiff to the jurisdiction of the magistrate was, always, available to him and he was entitled,

N. Y. Rep.]

Statement of case.

at any time, to insist that he could not be held under the warrant, nor tried for the alleged offense.

In determining to proceed with the trial of the plaintiff, the defendant was not committing a mere error in ruling with respect to the extent of his jurisdiction, in which case he would have been acting judicially and would have come under no liability; but he was proceeding without ever having acquired jurisdiction to try the plaintiff. The statute had conferred jurisdiction, in that respect, upon a magistrate of the town where the offense had been committed.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ., concur: CHASE, J., not sitting.

Judgment affirmed.

In the Matter of the Appraisal under the Transfer Tax Act
of the Estate of LEONARD J. GORDON, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;
WILLIAM E. GORDON et al., as Executors, et al., Respondents.

TRANSFER TAX—POLICY ISSUED UPON LIFE OF NON-RESIDENT OF STATE—WHEN PROCEEDS THEREOF NOT SUBJECT TO TAXATION WITHIN THIS STATE. The proceeds of a life insurance policy, issued upon the life of a non-resident by a domestic corporation and payable to the estate of the insured at the principal office of the company within this state, should be regarded as property within the state of decedent's residence rather than property within this state, and, therefore, not subject to a transfer tax under subdivision 2 of section 220 of the Tax Law (L. 1896, ch. 908, § 220), relating to the taxation of property of non resident decedents within this state; where it appears that the insured was a resident of a foreign state at the time the policy was issued; that the policy had at all times been kept within that state and the premiums paid there; that the insured died there; that his will was admitted to probate and his executors appointed there; that the proofs of death might have been made there, if the policy had not been voluntarily paid; that the company, as a condition of doing business in that state, had designated a certain official thereof to receive service of process with the same effect as if served personally upon the company; and that, at the time of the death of the insured, there was sufficient property of the company within that state to satisfy the policy, so that it would not have been necessary for decedent's

executors to come to this state to protect and collect his claim under the policy, if it had not been paid; such circumstances are sufficient to fix the situs of the contract of insurance and the claims arising thereunder in the state of decedent's residence and not within this state.

Matter of Gordon, 114 App. Div. 202, affirmed.

(Argued November 13, 1906; decided December 21, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 9, 1906, which reversed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Leonard J. Gordon, deceased.

The facts, so far as material, are stated in the opinion.

Jabish Holmes, Jr., and *Alfred Yankauer* for appellant. The debt, payable in money by the Equitable Life Assurance Society, a resident debtor, to the non-resident decedent, is taxable under the Transfer Tax Law, as the state's jurisdiction over the debtor gives jurisdiction for the purposes of taxation. (*St. John v. American*, 13 N. Y. 38; *Olmsted v. Keyes*, 83 N. Y. 593; *Blackstone v. Miller*, 188 U. S. 189; *Matter of Clinch*, 180 N. Y. 300; *Matter of Hewitt*, 181 N. Y. 547; *Matter of Daly*, 182 N. Y. 524; 100 App. Div. 374; *Matter of Phipps*, 77 Hun, 225; *Kratzenstein v. Lehman*, 19 App. Div. 225; *Amberg v. M. L. Ins. Co.*, 171 N. Y. 314.) The residence of the Equitable Life Assurance Company in the state of New York gives that state jurisdiction for the purpose of taxation, and makes the debt or liability evidenced by the policy due to a non-resident, property within the state of New York, and this rule is not affected by the fact that the corporation might be sued in New Jersey. (*Blackstone v. Miller*, 188 U. S. 207; *Graves v. Shaw*, 173 Mass. 205; *Plympton v. Bigelow*, 93 N. Y. 593; *Douglas v. P. Ins. Co.*, 138 N. Y. 209; *Woodward v. M. R. F. L. Assn.*, 178 N. Y. 485.)

Daniel Burke for respondents. The insurance policy is not taxable. It is not necessary to resort to the courts of New York to enforce payment. New Jersey has jurisdiction

N. Y. Rep.]

Opinion of the Court, per HISCOCK, J.

of the person of the Equitable Life Assurance Society, and, therefore, the chose in action represented by the policy is property in New Jersey. (*Blackstone v. Miller*, 188 U. S. 189; *Matter of Horn*, 39 Misc. Rep. 133; *Tax on Foreign Held Bonds*, 15 Wall. 300.)

HISCOCK, J. The question presented is whether a claim under a certain policy of life insurance issued by a New York corporation to and upon the life of a resident of New Jersey is property subject to a transfer tax in this state within subdivision 2 of section 220 of the Transfer Tax Law of 1896, which imposes a tax "when the transfer is by will or intestate law of property within the state and the decedent was a non-resident of the state at the time of his death."

The learned Appellate Division reversed the decision of the surrogate and held that it was not property so taxable, and we concur in this view.

It appears that the Equitable Life Assurance Society, a corporation organized under the laws of the state of New York, and having its principal office in that state, issued a policy of insurance to and upon the life of one Gordon who then was and continued to be a resident of New Jersey. We assume that in accordance with the usual custom this policy was issued from the New York office, but in response to and acceptance of an application made by the assured in New Jersey. It was payable to the insured, his executors, administrators or assigns, at the office of the society in New York, and was at all times kept in the state of New Jersey where the premiums upon it are stated, without contradiction, to have been paid and where proofs of death might be presented to the company. Upon the death of Gordon his will was there admitted to probate, whereby he appointed his acting executor, also a resident of that state, and provided for the distribution of his property, including the proceeds of said policy. Prior to decedent's death the state of New Jersey had enacted legislation which compelled said insurance company, as a condition of doing business there, to submit to the

jurisdiction of its laws and courts through the service of process upon a designated New Jersey official with the same effect as if made personally upon the company, and at said date there was sufficient property of the debtor in the state to satisfy the claim upon the policy.

It would seem as though all of these circumstances were amply sufficient to fix the situs of this contract of insurance and of the claims arising thereunder in New Jersey and that fairly and reasonably they should be regarded as property within that state, rather than within the state of New York so as to be taxable in the latter place under the statute already referred to. (*State Tax on Foreign Held Bonds*, 15 Wall. 300; *New Orleans v. Stemple*, 175 U. S. 309, and cases cited therein.)

It is, however, urged that principles which might otherwise be regarded as fixing the situs of this debt at the place of domicile of the owner and holder constitute more or less of an historical fiction which at times must yield to more practical and important considerations; that where a creditor must go to the domicile of his debtor and rely upon the laws and tribunals of that jurisdiction for enforcement of his claim, the latter should be regarded as having its situs there; that the claim here involved comes within this rule and must be regarded as property taxable in New York because there the debtor insurance company was organized and has its principal place of business and thither must go the policyholder for collection of his claim. And in support of this contention the learned counsel cites the cases of *Blackstone v. Miller* (188 U. S. 189); *Matter of Howlader* (150 N. Y. 37) and *Matter of Clinch* (180 N. Y. 300), which it is claimed have applied the principles invoked and upheld taxation in New York upon facts not to be differentiated from those presented here. We cannot, however, agree with him that these otherwise controlling decisions are predicated upon facts which fully square with those arising in this proceeding, for the creditor in each one of them unlike the respondents here was really under the necessity of going to the domicile of his

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

debtor in New York for protection and collection of his claim. Thus the essential fact was present which alone permitted the application of the principles referred to, and whatever was there said apparently supporting appellant's position must be interpreted in the light of that circumstance.

The *Blackstone* case involved the question of the right of the state of New York to impose a tax upon the transfer of an ordinary indebtedness due from a citizen of that state to a non-resident, and also of a deposit made by such non-resident in the state. There is no discussion of the right with reference to the ordinary indebtedness, but the entire opinion is devoted to a consideration of the power to impose a tax with respect to the deposit. This court had fully affirmed the right to impose a tax upon the transfer of a deposit made within the state upon the ground that it was the equivalent of actual money and, therefore, clearly property within the state. It had affirmed in that particular proceeding the imposition of a tax upon that ground and this was all that it was necessary to consider. The Supreme Court of the United States in the opinion delivered by Judge HOLMES, however, deemed it wise to go beyond this ground and hold that a tax could be sustained even upon the theory that the deposit was an ordinary debt. But this holding was unequivocally based upon the conditions disclosed in that case, which were that the debtor resided within the state and that the creditor must come there and take advantage of the laws of the state for the purpose of enforcing his claim. Judge HOLMES said: "But it is plain that the transfer (of the deposit) does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. * * * What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So again, what enables any

other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations to one side, it is plain that the right of the foreign creditor would be gone.

“Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim *mobilia sequuntur personam* had no more truth in the one case than in the other. When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way.”

In the *Houdayer* case, Judge VANN wrote in favor of the right to tax in the case of a deposit made in a New York bank by a non-resident somewhat along the same lines subsequently adopted by the Supreme Court of the United States in the *Blackstone* case, concluding that even if such deposit was to be regarded as constituting an ordinary indebtedness a tax could be imposed for the reason, amongst others, that it was property “within the state, because the owner must come here to get it. It is subject to taxation because it is under the control of our laws.”

While we do not think that anything there said on the facts as presented conflicts with our present views, it is to be observed that three of the four judges who concurred with Judge VANN did so upon the ground that the claim was a deposit to be regarded the same as money within the state and for that reason taxable here. The majority of the judges, therefore, concurring for taxation, did so upon the principle there distinctly enunciated that a deposit was in the nature of money or tangible property within the state.

In *Matter of Clinch*, the property which furnished the occasion for question in regard to taxation consisted of an interest in an estate. The person who held this interest was a non-resident of the country and the estate was being administered through probate proceedings in the state of New York, where the executor resided. It was held, under such circumstances, that the interest of the non-resident was property within the state, but Judge HAIGHT, writing for the court, made it very clear that this decision was based upon the circumstances there presented, saying: "In *Matter of Blackstone* (171 N. Y. 682) we followed the decision in the *Houdayer* case, and again taxed the deposit of a non-resident in a New York trust company. That case was appealed to the Supreme Court of the United States and our decision affirmed. (*Blackstone v. Miller*, 188 U. S. 189.) The Supreme Court took the same broad ground held by Judge VANN in this court (in *Houdayer* case). It said that the doctrine that the situs of personal property was the domicile of the owner was merely a fiction which must yield to facts; that it was the law of the place where the debtor resided which gave the debt validity and forced the debtor to pay, and that it was within the constitutional power of the state where the debtor resided to tax the obligation from him to a non-resident. * * * Under the doctrine of the *Blackstone* case the interest of Robert Clinch in his father's estate was subject to the inheritance tax imposed by the laws of this state."

In *Matter of Hewitt* (181 N. Y. 547) and in *Matter of Daly* (182 N. Y. 524), also called to our attention, the court affirmed, without opinion, the action of the court below in imposing a tax, and in each of these cases the right to impose such tax was clearly sustained upon principles applicable to a deposit in bank.

Therefore, in each of the cases above referred to, where something was said by the court which is regarded by appellant as sustaining his views, the significant fact was present, outside of any others, that the party having a claim could not compel its satisfaction except by coming to the state of New

York, where resided, in two cases, the debtor, and where, in the other case, was being administered the estate in which he had an interest, and such fact legitimately led to the conclusion that this state was in position to impose a tax.

That, however, as we have already seen, is not the case at bar, for here the courts of New Jersey had just as complete jurisdiction of the insurance company as did those of the state of New York, and if, as suggested by Judge HOLMES, the state of New York had seen fit to "turn back the current of legislation and to extend to debts the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party," the parties interested still would have been able to bring suit in New Jersey against their debtor and there with full jurisdiction as upon personal service obtain a judgment which could have been satisfied out of property found within that state, and to which judgment, if it became necessary to bring an ancillary suit upon it in the state of New York, our courts would have been compelled to give due recognition as establishing within broad limitations the rights of the parties and the obligations of the debtor.

It is, however, urged that provision for a suit upon the insurance policy in New Jersey is too accidental and unimportant a fact to influence the determination of this case and distinguish it from the *Blackstone* and *Houdayer* and *Clinch* cases. This argument does not secure our assent. The policy throughout the different states of compelling an insurance company seeking to do business in one of them, to submit to the jurisdiction of its courts by provision for a substituted service upon some person, has been widespread, deliberate and very exacting. It was intended to obviate the possibility that an individual procuring insurance at the place of his domicile should be compelled for enforcement of his contract to go to some distant forum and become subject to the embarrassments and burdens which might result therefrom. It was designed to give to the insured or his representatives or

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

assigns full opportunity to enforce the contract of insurance at the place where it was accepted, and to give to the state wherein he resided just as complete jurisdiction over the insurer as was possessed by the state wherein it was organized. We feel that we are entirely justified in the view that this class of legislation was distinctly intended to abrogate that very idea that the insured could only obtain redress by resorting to the laws of the state wherein the insurance company had its organization and principal place of business, which is made the basis of taxation in the decisions cited.

Our view that this case is distinguished by at least one controlling fact from the *Blackstone* and other cases which we have reviewed, and that respondents' claim, tested by the ordinary and essential attributes incident to ownership of such a chose in action, is to be regarded as property within the state of New Jersey rather than the state of New York, is confirmed by the quite pertinent authority of *New England Mutual Life Insurance Company v. Woodworth* (111 U. S. 138) and *Sulz v. Mutual Reserve Fund Life Association* (145 N. Y. 563).

In the first case the insurance company being a corporation organized under the laws of, and having its principal place of business in, the state of Massachusetts, issued a policy of insurance to one Ann E. Woodworth as assured, by which it agreed to pay five thousand dollars to her, her executors, administrators or assigns, after presentation of proof of loss, for the benefit of her husband if he should survive her. The proofs of death were to be furnished and the insurance was made payable at the Boston office. Mrs. Woodworth died in New York, but her husband after her death resided in Illinois, having in his possession there the policy. The laws of Illinois provided, as a condition of its doing business in that state, that process might be served upon the company by delivering a copy to a specified person as attorney. It did not appear that the company was required to or did keep assets in that state. It was held, under these circumstances, less strong in respect to the domicile of the assured

than those existing in this case in behalf of the respondents, that the claim upon the policy constituted personal property in the state of Illinois so as to furnish a basis for letters of administration in that jurisdiction. Mr. Justice BLATCHFORD, writing in behalf of the court, after reference to the law providing for a substituted service in Illinois upon the company, said: "In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be regarded as having a domicile there, in the sense of the rule that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration there. * * * The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this court has recently affirmed in *Wyman v. Hulstead* (109 U. S. 654). But the reason why the state which charters a corporation is its domicile in reference to debts which it owes, is because there only can it be sued or found for the service of process. This is now changed in cases like the present; and in the courts of the United States it is held that a corporation of one state doing business in another is suable in the courts of the United States established in the latter state, if the laws of that state so provide, and in the manner provided by those laws."

The learned judge also discussed somewhat and overruled objections akin to those urged by the appellant in this case, that proceedings could be instituted in the state where the company was organized and other jurisdictions, saying: "It is argued for the plaintiff in error that administration could have been taken out in Michigan on the policy, on the view that that was the domicile of the assured, and that it could

N. Y. Rep.] Opinion of the Court, per HISCOCK, J.

have been taken out in Massachusetts, without regard to the location of the policy at the time of the death of Mrs. Woodworth, and without regard to the fact that she died in another jurisdiction. * * * The reason assigned for taking out letters in Massachusetts has equal force when applied to a state where the debtor does business under the laws of that state, and can be sued as fully as in Massachusetts, and is sure to be found so as to be served with process. If the defendant is to be sued in Illinois, administration must be taken out there; and administration in Massachusetts or in Michigan would not suffice as a basis for a suit in Illinois. The consent and capacity to be sued in Illinois still require, if an administrator is to be the plaintiff, that letters should be issued in Illinois; and by the terms of the policy, on the death of the assured, the suit must be by her executor or administrator. So it results, that the question in this case must be decided on the same principles as if Illinois were the only state in which suit could be brought, and, therefore, the state in which letters of administration must be taken out for the purpose of a suit."

Bearing in mind that in this case an administrator has been appointed in the state of New Jersey, and, so far as appears, not in this state, and that such New Jersey administrator has actually collected the proceeds of the policy, the *Sulz* case is very pertinent. In that case the court, after referring to the decision in the *Woodworth* case just quoted from, says: "Within the above case in the federal court the person of the debtor in this case was within the State of Washington, and the debt could be collected there as well as here. It is a case, therefore, of a concurrent jurisdiction, so far as the general facts go, and in such case the situs of the policy, the death of the insured in Washington and the issuing of letters of administration in that state and the prior commencement of the Washington action are material facts. In this case we do not assert that the courts of this state might not have had jurisdiction to entertain this action, even though the policy were in the state of Washington, provided the courts of that

state had not appointed an administrator, and the administrator thus appointed had not commenced an action on the policy prior to the action in this state. * * * But in the case of administrators duly appointed in each state, when the foreign administrator first duly commences an action by the service of process upon an agent of the company to recover on the policy, and the policy is found in the foreign state at the death of the assured in that state, we think the courts of the foreign state have obtained jurisdiction, and, therefore, could give full and complete discharge to the company if it paid upon a judgment obtained in such action, and we ought not to permit a second action in the courts of this state upon the same policy. In such a case as this we think that the principle of comity between the states calls for the refusal on the part of the courts of this state to entertain jurisdiction."

This case, therefore, distinctly holds that while under such circumstances as are presented, our courts might entertain jurisdiction of a suit if there commenced first, they have not that sole and exclusive jurisdiction for enforcement of the contract which would compel the creditor to come to them and thus afford that basis for taxation which is relied upon by the appellant.

In conclusion we might say that we are unable to contemplate with a confidence born of great optimism the results which would follow from the adoption and enforcement of the doctrine urged by appellant. If the contract in this case is subject to the imposition of a transfer tax, then any contract of insurance issued to a non-resident, passing to and held by his non-resident representatives or assigns, and being administered and enforceable in a foreign jurisdiction, whether in the state of Texas or California, or in some foreign country, would afford the basis of taxation in this state, provided only the policy was issued by a New York corporation and access could be obtained by the tax collector to its proceeds. No distance of domicile of the assured and his transferees or beneficiaries, and no completeness of foreign jurisdiction over administration and enforcement, and no lack of anticipation

N. Y. Rep.]

Opinion of the Court, per HISCOCK, J.

of such a result upon the part of the assured, would be a bar to the attempted application of the taxing power. It requires no great imaginative processes to picture the limits and the disapproval and friction to which this theory would lead if logically carried to its full length.

It was undoubtedly the intent of the legislature that the statute under consideration should be liberally construed to the end of taxing the transfer of all property which fairly and reasonably could be regarded as subject to the same, and this court has unequivocally placed itself upon record in favor of construing the statute in the light of such intent. But the proposition now propounded, if adopted, would lead far beyond any point which has thus far been reached, and we do not believe that it would be wise or practicable to adopt it. We can scarcely believe that the various states and countries which have so carefully and positively protected their citizens holding policies of insurance issued by foreign corporations from the burden and annoyance of being compelled to go to distant forums for the purpose of enforcing their contracts, would permit them to be subjected to a species of taxation based upon an assumed necessity for resort to foreign courts which has thus been obviated. We believe that if the policy being urged upon us were adopted, the great business of insurance now being conducted by corporations chartered and under the protection of the state of New York, would be subjected to new and unexpected embarrassment.

For these reasons the order appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur.

Order affirmed.

FAR ROCKAWAY BANK, Respondent, v. FRANKLIN C. NORTON,
Appellant.

1. PROMISSORY NOTE — WHEN EVIDENCE OF SUFFICIENT FUNDS TO PAY NOTE DEPOSITED BY MAKER WITH PAYEE, IMMATERIAL. In an action by the payee against the indorser of an accommodation promissory note, evidence that the maker had, some time subsequent to the maturity of the note, sufficient funds in the hands of the plaintiff to pay it is properly excluded in the absence of any direction to or agreement with the plaintiff to use the funds for that purpose.

2. LIABILITY OF INDORSER TO PAYEE — NEGOTIABLE INSTRUMENTS LAW, § 114. The reception of evidence tending to establish the fact that the defendant had indorsed the note in suit with the purpose of giving the maker credit with the payee, even if erroneous, is immaterial, where the note was executed after the enactment of the Negotiable Instruments Law (L. 1897, ch. 612, § 114) which changed the rule that the indorser was presumed to be the second indorser and not liable to the payee and provided that "where a person not otherwise a party to the instrument places thereon his signature in blank before delivery, he is liable as indorser * * * if the instrument is payable to the order of a third person, * * * to the payee and all subsequent parties."

Far Rockaway Bank v. Smith, 110 App. Div. 917, affirmed.

(Submitted December 13, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 8, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

James S. Darcy for appellant. The referee committed reversible error in rejecting competent evidence, showing that the respondent had ample money of the maker of the note on deposit to pay the note in suit. (*Pitts v. Congdon*, 2 N. Y. 352; *Bacon v. Burnham*, 37 N. Y. 614; *Smith v. Weston*, 159 N. Y. 194; *N. E. Bank v. Silliman*, 65 N. Y. 475; *Spies v. N. C. Bank*, 174 N. Y. 222; *Jordan v. N. S. & L. Bank*, 74 N. Y. 473; *Shutts v. Fingar*, 100 N. Y. 546.) The referee committed reversible error in receiving incompe-

N. Y. Rep.] Opinion of the Court, per CULLEN, Ch. J.

tent, and rejecting competent, testimony over appellant's objection. (*Newell v. Doty*, 33 N. Y. 83; *Merritt v. Briggs*, 57 N. Y. 651; *Kellar v. Richardson*, 5 Hun, 352; *Pope v. McGill*, 58 Hun, 294; *Betjemann v. Brooks*, 39 Hun, 649; *Drew v. Longwell*, 81 Hun, 144.)

William Willett, Jr., for respondent. No reversible error was committed by the referee in the reception or rejection of evidence. (*Nat. Bank v. Smith*, 66 N. Y. 271; *Bank of Port Jefferson v. Darling*, 91 Hun, 236.)

CULLEN, Ch. J. The action is brought on a promissory note made by one Smith to the plaintiff, which the defendant indorsed prior to its delivery to the payee. But two questions are presented on this appeal.

First. It is alleged the referee committed error in excluding evidence offered by the defendant to show that Smith, the maker, had, some time subsequent to the maturity of the note, a sufficient deposit in the plaintiff bank to pay it, which the plaintiff failed to appropriate for that purpose. The case of *National Bank of Newburgh v. Smith* (66 N. Y. 271) is a conclusive authority to the effect that in the absence of any direction or agreement to that effect it was optional with the plaintiff whether it would apply the money or not upon the note in suit, and that it was under no positive legal obligation to do so. Therefore, there was no error committed in this respect.

Second. The note was given in renewal and to take up an earlier note also indorsed by the defendant. To establish the fact that the defendant had indorsed the note with the purpose of giving the maker credit with the payee, proof was given tending to show that default having been made in the payment of the earlier note notice of protest thereof was given to the defendant. It is urged that the evidence as to the protest of the earlier note was not of a proper character. It is unnecessary to consider this question, for since the enactment of the Negotiable Instruments Law (Laws 1897, ch. 612) the law obtaining in the case of such indorsements as that

made by the defendant has been radically changed. Prior to that time the indorser was presumed to be a second indorser and not liable to the payee, though it was competent for the payee to prove *aliunde* that the intention of the indorser was to give the maker credit with the payee. (*Bacon v. Burnham*, 37 N. Y. 614; *Coulter v. Richmond*, 59 N. Y. 478.) Section 114 of the Negotiable Instruments Law prescribes a different rule. It is enacted that "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties."

This note was made in December, 1898, and, therefore, the proof offered by the plaintiff was not necessary to maintain its cause of action, and the error, if error there was, was immaterial.

The judgment appealed from should be affirmed, with costs.

GRAY, O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK and CHASE, JJ., concur.

Judgment affirmed.

ERNEST P. BUTLER, Respondent, v. THE FRONTIER TELEPHONE COMPANY, Appellant.

EJECTMENT — OCCUPATION BY TELEPHONE WIRE OF SPACE ABOVE LAND. An action of ejectment will lie where the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant above the plaintiff's premises; the disseizin of the owner is measured by the extent of the space occupied and the sheriff can physically remove the wire and thereby restore the plaintiff to possession.

Butler v. Frontier Telephone Co., 109 App. Div. 217, affirmed.

(Argued November 28, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 6, 1905, affirming a judgment in favor of plaintiff

entered upon a decision of the court at a Trial Term without a jury.

This is an action of ejectment, which was tried by consent before the court without a jury. The trial judge found as facts that "the defendant on or about January 1, 1903, without the consent of the plaintiff and without lawful authority, entered upon" his premises in the city of Buffalo "and stretched a wire over and across the same in the manner described in the complaint and maintained said wire upon said premises until January 10, 1903, when the defendant removed the said wire entirely from plaintiff's said premises."

According to the allegations of the complaint the wire was strung "about thirty feet from the surface of the ground on the easterly side and slanting to about twenty feet on the westerly side," reached "across the entire width of said premises."

The trial judge further found that "the plaintiff has been in possession of the premises described in the complaint at all times mentioned therein and since, except that portion thereof occupied by the defendant with said wire during the period specified." The damages sustained by the plaintiff were assessed at six cents for "the withholding by the defendant of that portion of the premises occupied by said wire for the period above specified." There was neither allegation nor evidence that the wire was supported by any structure standing upon the plaintiff's lot. The action was commenced on the 5th of January, 1903.

The court found as a conclusion of law that the plaintiff, as the owner in fee of the premises in question, "was entitled at the commencement of this action to have said wire removed from said premises, and is entitled to judgment against the defendant so declaring, and for six cents damages for withholding said property and for the costs of this action * * *."

The judgment entered accordingly was affirmed on appeal to the Appellate Division by a divided vote, and the defendant now comes here.

Lyman M. Bass for appellant. The plaintiff is not entitled to maintain an action for ejectment. (*Leprell v. Kleinschmidt*, 112 N. Y. 364; *Vrooman v. Jackson*, 6 Hun, 326; *Aiken v. Benedict*, 39 Barb. 400; *Jackson v. May*, 16 Johns. 184; *Child v. Chappell*, 9 N. Y. 246; *Mayor, etc., v. N. S. S. Ferry Co.*, 55 How. Pr. 154; *Sasserath v. Metzgar*, 30 Abb. [N. C.] 407; *Rowan v. Kelsey*, 18 Barb. 484; *Anonymous*, 3 Leon. 210; *D'Acre's Case*, 1 Lev. 58.) The plaintiff not only was not entitled to a judgment of ejectment but failed to secure one. Therefore a judgment for costs upon the theory that he obtained such a judgment is erroneous. (Code Civ. Pro. § 3228, subd. 4; *Lynk v. Weaver*, 128 N. Y. 171; *Dunster v. Kelly*, 110 N. Y. 558.)

George C. Hillman for respondent. The rights of the parties in this action are to be determined as of the time of the commencement of the action. (*Wisner v. Ocumpaugh*, 71 N. Y. 113; *Caswell v. Kemp*, 41 Hun, 434.) The plaintiff is entitled to costs. (*Brooks v. Curtis*, 50 N. Y. 639; *Dunster v. Kelly*, 110 N. Y. 558.) The plaintiff was entitled to recover upon the facts stipulated and found. (*Plummer v. G. E. Co.*, 20 App. Div. 527; *Brooks v. Curtis*, 50 N. Y. 639; *Lynk v. Weaver*, 128 N. Y. 171.) In an action to recover real property, or an interest in real property, costs follow as a matter of course regardless of whether a claim of title arises upon the pleadings. (*Sherry v. Freckling*, 4 Duer, 456; *Aiken v. Benedict*, 39 Barb. 400; *Vrooman v. Jackson*, 6 Hun, 326; *Murphy v. Bolger*, 60 Vt. 723; *McCourt v. Eckstein*, 22 Wis. 153; *Rowan v. Kelsey*, 18 Barb. 484.)

VANN, J. The question presented by this appeal is whether ejectment will lie when the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant across the plaintiff's premises? This question has never been passed upon by the Court of Appeals nor by the Supreme Court, except in the decision now before us for review. Questions similar but not identical, as they related to overhanging eaves, projecting

cornices or leaning walls, were decided in favor of the defendant in *Aiken v. Benedict* (39 Barb. 400), and *Vrooman v. Jackson* (6 Hun, 326), and in favor of the plaintiff in *Sherry v. Freeking* (4 Duer, 452). In *Leprell v. Kleinschmidt* (112 N. Y. 364) the question as to the effect of projecting eaves was alluded to but not decided, because there was in that case "a physical entry by the defendant upon the land of the plaintiffs and an unlawful detention of its possession from them."

The precise question before us does not appear to have been passed upon in any other state, and upon the cognate question relating to projecting cornices and the like, the authorities are divided. Some hold that ejectment will lie because there is an actual ouster or disseisin. (*Murphy v. Bolger*, 60 Vt. 723; *McCourt v. Eckstein*, 22 Wis. 153; *Stedman v. Smith*, 92 Eng. C. L. 1.) Others hold that there is not such a disturbance of possession as to sustain an action in that form. (*Norwalk H. & L. Co. v. Vernam*, 75 Conn. 662; *Rasch v. Noth*, 99 Wis. 285.) The case last cited does not overrule the earlier case in Wisconsin, but proceeds upon the theory that the aerial space was occupied by the projecting eaves of both parties, one above the other, on opposite sides of the boundary line. Some of the cases hold that a court of equity may order the removal of a projection without deciding whether ejectment will lie or not. Thus, in *Wilmarth v. Woodcock* (58 Mich. 482, 485), it was decided that equity would require the removal of a projecting cornice because "no remedy at law is adequate, owing to the uncertainty of the measure of damages, to afford complete compensation." But, as the learned court continued: "No person can be permitted to reach out and appropriate the property of another and secure to himself the adverse enjoyment and use thereof, which, in a few years, will ripen into an absolute ownership by adverse possession." (See, also, *Plummer v. Gloversville Electric Co.*, 20 App. Div. 527.)

While some of the cases may be harmonized by resort to the distinction between "disseisins in spite of the owner, and

disseisins at his election," the main question is open, and must be determined upon principle.

The defendant concedes that the plaintiff has a remedy, but insists that it is an action for trespass, or to abate a nuisance, while the plaintiff claims that ejectment is a proper remedy and one of especial value as it entitles him, if he needs it, to a second trial as a matter of right and to costs, even if he recovers less than fifty dollars damages. (Code Civ. Pro. §§ 1525, 3228.)

An action of ejectment, according to the Code, is "an action to recover the immediate possession of real property." (Code Civ. Pro. § 3343, sub. 20.) While the statute to some extent regulates the procedure, it did not create the action and for the principles which govern it resort must be had to the common law. (Code Civ. Pro. §§ 1496 to 1532; Real Property Law, §§ 1, 218; 2 R. S. 303.)

Without entering into the somewhat involved and perplexing learning upon the subject, it is sufficient to say that, as all the authorities agree, the plaintiff must show that he was formerly in possession, that he was ousted or deprived of possession and that he has a right to re-enter and take possession. It is admitted by the pleadings that when the wire was put up the plaintiff was in possession of the entire premises and that he was entitled to the immediate possession thereof as owner when the action was commenced. The serious question is whether he was deprived of possession to the extent necessary to authorize ejectment. While ouster is essential to the maintenance of the action, it need not be entire or absolute. for it is sufficient if the defendant is in partial possession of the premises while the plaintiff is in possession of the remainder, (*Sullivan v. Legraves*, 2 Str. Cases, 695; *Doe v. Burt*, 1 T. R. 701; *Lady Dacre's Case*, 1 Lev. 58; *Rowan v. Kelsey*, 18 Barb. 484; *Otis v. Smith*, 26 Mass. 293; *Gilliam v. Bird*, 8 Iredell [Law], 280; *Reynolds v. Cook*, 83 Va. 817; *McDowell v. King*, 4 Dana [Ky.], 67; *Adams on Ejectment*, 27; *Newell on Ejectment*, 38; *Warvelle on Ejectment*, 22.) Mines, quarries, mineral oil and an upper room in a house are familiar

N. Y. Rep.]

Opinion of the Court, per VANN, J.

examples. Is the unauthorized stringing of a wire by one person over the land of another an ouster from possession to the extent that the wire occupies space above the surface as claimed by the plaintiff, or a mere trespass or interference with a right incidental to enjoyment as claimed by the defendant? Was the plaintiff in the undisturbed possession of his land when a portion of the space above it was occupied by the permanent structure of the defendant, however small? Was the space occupied by the wire part of the land in the eye of the law?

What is "real property?" What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: *Cujus est solum, ejus est usque ad coelum et ad inferos*. The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath. (Co. Litt. 4a; 2 Blackstone's Comm. 18; 3 Kent's Com. [14th ed.] *401.) "*Usque ad coelum*" is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles and within the limitation mentioned space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly.

If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would have been dispossessed *pro tanto*. A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however, does not control, for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including

the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed. Where along the line of these illustrations would dispossession begin? What rule has the law to measure it by? How much of the space above the plaintiff's land must be subjected to the dominion of the defendant in order to effect a dispossession? To what extent may the owner be dispossessed and kept out of his own before there is a privation of seisin? Unless the principle of *usque ad coelum* is abandoned any physical, exclusive and permanent occupation of space above land is an occupation of the land itself and a disseisin of the owner to that extent.

The authorities, both ancient and modern, with some exceptions not now important, agree that the ability of the sheriff to deliver possession is a test of the right to maintain an action of ejectment. (*Jackson v. Buel*, 9 Johns. 298; *Woodhull v. Rosenthal*, 61 N. Y. 382, 389; *Patch v. Keeler*, 27 Vt. 252, 255; Warvelle on Ejectment, 34; Crabb on Real Property, 710; Butler's Nisi Prius, 99.) "The rule now is, that when the property is tangible and an entry can be made and possession be delivered to the sheriff, this action will lie." (*Nichols v. Lewis*, 15 Conn. 137.) The defendant insists that the sheriff cannot give possession of space any more than he can deliver water in a running stream or "air whirled by the north wind." When the space over land is unoccupied there is no occasion for delivery, because there is nothing to exclude the owner from possession. The sheriff, however, can deliver occupied space by removing the occupying structure. All that he does to deliver possession of the surface of land, or of a mine under the surface, is to remove either persons or

N. Y. Rep.]

Statement of case.

things which keep the owner out. He does not carry the plaintiff upon the land and thus put him in possession, but he simply removes obstructions which theretofore had prevented him from entering. So, in this case, that officer can deliver possession by removing the wire, the same as he would if one end happened to be embedded in the soil, when no question as to the right to bring ejectment could arise. Where there is a visible and tangible structure by which possession is withheld to the extent of the space occupied thereby ejectment will lie, because there is a disseisin measured by the size of the obstruction, and the sheriff can physically remove the structure and thereby restore the owner to possession.

The smallness of the wire in question does not affect the controlling principle, for it was large enough to prevent the plaintiff from building to a reasonable height upon his lot. The prompt removal of the wire after the suit was brought could not defeat the action because the rights of the parties to an action at law are governed by the facts as they existed when it was commenced. (*Wisner v. Ocumpaugh*, 71 N. Y. 113.)

The judgment should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, WILLARD BARTLETT and CHASE, JJ., concur; O'BRIEN and HAIGHT, JJ., absent.

Judgment affirmed.

WALLACE JEMISON, Respondent, v. THE BELL TELEPHONE COMPANY OF BUFFALO, Appellant.

1. INDIANS—TONAWANDA NATION OF SENECA INDIANS—JURISDICTION OF STATE OF NEW YORK OVER LANDS OWNED BY NATION AND MEMBERS THEREOF—CONSTITUTIONALITY OF STATUTE (L. 1902, CH. 296), REGULATING THE ERECTION OF TELEPHONE AND TELEGRAPH LINES UPON SUCH RESERVATION AND LANDS. Under a decision, made in 1786, by commissioners appointed by the states of Massachusetts and New York to settle a controversy between such states relating to lands now held by the Tonawanda Nation of Seneca Indians, and under a subsequent treaty between such tribe and the United States government, the state of New York exercises exclusive sovereignty and jurisdiction over the Tona-

wanda Nation of Seneca Indians and the lands held by such nation or by individual members thereof, and consequently the provisions of the United States statutes enacted for the regulation of commerce with the Indian tribes pursuant to the Constitution of the United States (U. S. Const. art. 1, § 8, subd. 3) are not violated by the statute (L. 1902, ch. 296) amending the Indian Law (L. 1892, ch. 679) by adding thereto a new section (89), providing that when any telephone or telegraph company shall erect poles, for the purpose of supporting telephone or telegraph wires, upon lands allotted to or otherwise owned by individual members of the Seneca Nation on the Tonawanda reservation, the damages caused thereby, to be fixed by agreement or in condemnation proceedings, shall be paid to such owners in addition to any sum paid to the council of the nation for the privilege of erecting poles upon the reservation.

2. SAME — WHEN LANDS OCCUPIED BY MEMBERS OF NATION DEEMED TO HAVE BEEN ALLOTTED UNDER THE INDIAN LAW (L. 1892, CH. 679, § 56) — WHEN OCCUPANT OF LANDS MAY MAINTAIN ACTION OF EJECTMENT AGAINST TELEPHONE COMPANY ERECTING POLES AND WIRES ON HIS LANDS. Where a member of the Tonawanda Nation of Seneca Indians has occupied and been in undisputed possession of lands within the reservation, purchased by his mother from the chiefs of the nation in 1859, for a period of more than twenty-two years, the presumption that such occupant holds the lands under an allotment within the meaning of section 56 of the Indian Law (L. 1892, ch. 679, § 56) is controlling, and he must be deemed to be the owner in fee, having the full Indian title, as a member of the Tonawanda Nation of Seneca Indians, to the land in question, subject to the easement of the public, for the purposes of travel in a highway running through such lands; and as such owner in fee is entitled to maintain an action of ejectment against a telephone company which has erected telephone poles and stretched wires upon his lands along the highway without his consent, notwithstanding the fact that the company has obtained permission from the council of the nation to erect such poles and wires across the lands of the reservation.

Jemison v. Bell Telephone Co., 109 App. Div. 911, affirmed.

(Submitted December 10, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 2, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles B. Sears for appellant. The plaintiff cannot maintain this action, as there is a failure to prove that he is an

N. Y. Rep.] Opinion of the Court, per EDWARD T. BARTLETT, J.

allottee. (L. 1849, ch. 420, §§ 7-10; L. 1863, ch. 90, §§ 16, 17.) Chapter 296 of the Laws of 1902 is unconstitutional. (*Lemont v. Cheshire*, 65 N. Y. 30; *Jarvis v. Lynch*, 157 N. Y. 445; *Onondaga Nation v. Thacher*, 53 App. Div. 561; *Cherokee Nation v. Georgia*, 5 Pet. 1; *U. S. v. Holliday*, 3 Wall. 407; *Fellows v. Deniston*, 5 Wall. 761; *U. S. v. Kagama*, 118 U. S. 375; *B., R. & P. R. R. Co. v. Lavery*, 75 Hun, 399; *Ryan v. Knorr*, 19 Hun, 540; *Shongo v. Miller*, 45 App. Div. 339; 169 N. Y. 586; *Matter of Middleton*, 82 N. Y. 196.)

Adelbert Moot for respondent. The plaintiff showed an allotment of the lands in question by the long-continued occupancy of himself, his grantors and ancestors, and by his improving, cultivating and fencing them under the eyes of the tribe. (*Seneca Nation v. Christie*, 126 N. Y. 122; *Seneca Nation v. Lehly*, 55 Hun, 83.) The legislature of this state has authority to allow the Tonawanda Indians to make any just disposition of their reservation, or any portion thereof. (*Johnson v. L. I. R. R. Co.*, 162 N. Y. 462.)

EDWARD T. BARTLETT, J. The plaintiff had been for nineteen years, at the time of the trial, a chief of the Tonawanda band of Seneca Indians, and for forty years or more a resident, and exceeding twenty years a landowner, on the Tonawanda Indian reservation, in the town of Alabama, county of Genesee and state of New York.

The plaintiff's premises are briefly described as follows in the complaint: "It is bounded on the east by the lands of Jonathan Jemison, on the south by the West Shore Railroad, on the west by the lands of Erastus Printup, on the north by the center of the highway leading from Bascom to Akron and the lands of Joseph Charles and Anna Charles his wife."

The defendant is a domestic corporation organized some years before the transactions involved in this action, and has its principal office in the city of Buffalo, Erie county.

The complaint charges that prior to the commencement of

Opinion of the Court, per EDWARD T. BARTLETT, J. [Vol. 186.]

this action the defendant, its agents and servants, did unlawfully enter and without his authority upon said premises of the plaintiff, lying between the center of the aforesaid highway and the southerly side thereof, and did eject the plaintiff therefrom and dug holes in and erected telephone poles upon and stretched wires over said premises throughout the whole length thereof, from the easterly line to the westerly line of the same, and cut and trimmed various trees that the plaintiff or his ancestors or grantees had planted on said premises.

The complaint further alleges, after setting forth possession and occupancy on the part of the plaintiff, that the defendant unlawfully withholds the possession of said property to his damage of \$500.00. The plaintiff also avers that he brings this action in accordance with the Laws of 1902, chapter 296, entitled "An act to amend the Indian Law in relation to the erection of poles and wires on the Tonawanda Reservation." It is also alleged that the plaintiff brings this action in his individual right and to right an individual wrong.

The defendant in its answer puts in issue the allegations of the complaint and sets up the following defenses, in substance: That in or about the year 1900 it obtained from the Tonawanda Nation of Seneca Indians the permission and right to erect the poles and stretch the wires and trim the trees, as alleged in the complaint, by a certain resolution adopted by the said Tonawanda Nation of Seneca Indians, paying therefor a valuable consideration; that chapter 296 of the Laws of 1902 is unconstitutional and void in that it is violative of subdivision one of section ten of article one of the Constitution of the United States in that it impairs the obligation of contracts. It is also alleged that chapter 296 of the Laws of 1902 is unconstitutional and void in that it is violative of and in conflict with the statutes of the United States providing for the regulation of commerce with the Indian tribes, among others, section 2116 of the Revised Statutes of the United States, and chapter 832 of the Laws of the United States, passed in the year 1901, pursuant to the provisions of the Constitution of the United States, among other provisions

N. Y. Rep.] Opinion of the Court, per EDWARD T. BARTLETT, J.

subdivision three of section eight of article one of said Constitution.

It is proper at the outset to dispose of the constitutional and statutory defenses interposed by the defendant. The suggestion that chapter 296 of the Laws of 1902 is in conflict with the Constitution and statutes of the United States ignores the history of the Seneca Indians and several other Indian tribes in the state of New York. That history dates back, so far as the Seneca tribe is concerned, to a time when two charters to their lands, among others, were granted; one by Charles the First of England to the colony of Massachusetts Bay and New England in 1628, and the second by Charles the Second to James, Duke of York, in 1664. After the Revolutionary war and the original thirteen states had adopted their Constitutions, the state of Massachusetts claimed these lands in western New York under the first charter named, and the state of New York claimed them under the second charter. Commissioners were appointed by the states of Massachusetts and New York and the result was, as announced in 1786, that the jurisdiction and sovereignty of these lands were found to be in the state of New York; that the state of Massachusetts retained the right to pre-empt these lands from the Indians and extinguish the Indian titles thereto.

It is unnecessary to trace this history for the next seventy-five years through the negotiations and transfers that resulted in the creation of the Ogden Land Company, the Holland Land Company and other purchases and sales of the Indian lands, many of which reflect little credit upon the transactions so far as the white men were concerned.

In 1857 the Tonawanda band of Seneca Indians negotiated a new treaty by which they surrendered the right to certain land in western Kansas, to which they had been practically exiled, and purchased of the surviving trustee of the Ogden Company 7,547 acres, comprising the present Tonawanda reservation, paying therefor twenty dollars an acre. By the terms of the treaty these lands were conveyed to the secretary of the interior of the United States in trust, and in February,

1863, the secretary of the interior conveyed these lands to Lucius Robinson, the then comptroller of the state of New York and his successors in office, in fee, in trust for the Tonawanda band of Seneca Indians, pursuant to an act of the legislature of the state designating the party to whom the conveyance was to be made in pursuance of the said treaty of 1857.

This historical question is dealt with to a great extent in the case of *Seneca Nation of Indians v. Christie* (126 N. Y. 122; affirmed, 162 U. S. 283). The state of New York exercises the exclusive sovereignty and jurisdiction over the Seneca Nation of Indians, and the case at bar consequently involves no Federal question. The Constitution and statutes of the United States apply to Indian lands in many jurisdictions outside of this state.

The defense interposed to the effect that the Laws of 1902, chapter 296, is unconstitutional as impairing the obligation of contracts, does not seem to have been seriously insisted upon at the trial of this action. Be that as it may, we hold that the law is a valid exercise of the legislative power.

This brings us to the consideration of the merits. The title of the plaintiff to the premises in question rests on the provisions of section 56 of the Indian Law and the laws and usages of the Seneca Nation to which reference is therein made. Section 56 provides, in part, as follows: "All lands on either the Allegany, Cattaraugus or Tonawanda Reservations, except such as have been allotted by the National Council, or lands on the Allegany and Cattaraugus Reservations, appropriated, cultivated and improved by an Indian or Indian family or the heirs thereof, in accordance with the laws and usages of the Seneca Nation, or lands on the Tonawanda Reservation, to which the possessors have become entitled in pursuance of law without an allotment, shall be held in common by the Seneca and Tonawanda Nations, respectively, and be subject to the control of the Council thereof." The laws and usages of the Seneca Nation were proved by plaintiff by evidence that is uncontradicted.

N. Y. Rep.] Opinion of the Court, per EDWARD T. BARTLETT, J.

The plaintiff swore that he was fifty-one years of age and born and brought up on the reservation; that he had lived on the place he now occupies for twenty-two years, and on a portion of it for nearly his entire life; that he lives on the property described in the complaint; that his mother was a Tonawanda Indian and purchased land of the chiefs about 1859. It is stated by counsel on the record that before 1863 the Indians made no written records. Plaintiff testified "that the land was surveyed and laid out about that time. After my father's death the land was divided by my mother between myself and my brother and herself in three equal parts and the line was drawn east and west and the south third was given to me. * * * I am familiar with the Indian laws and customs on the Tonawanda Reservation and those of the Tonawanda Band of the Seneca Nation of Indians. I do know whether or not records were kept of allotments or sales previous to 1863." The plaintiff also testified as to having other portions of the land surveyed and building a house and erecting fences. The plaintiff further testified: "I have occupied all of it at least twenty-two years; nobody ever disputed my occupation; I have farmed it, occupied the whole of it as a farm openly so that my neighbors all knew it. My land has been recognized as mine by the other members of the Nation. My mother died seven years ago next July. She gave me the balance of the sixteen acres she owned. The consideration was she had lived with me; I supported her about twenty-five years."

The record contains other evidence of a like persuasive character, showing that the plaintiff's lands were allotted and come clearly within the exception contained in section 56 of the Indian Law already quoted. It is clear that the plaintiff cannot be treated as holding his lands without an allotment, as is urged by the appellant, and is not subject to the control of the council as to their disposition. There is a presumption of a grant of occupancy from long possession. (*Seneca Nation of Indians v. Lehigh*, 55 Hun, 83.)

Chapter 296, Laws of 1902, is an act to amend the Indian

Law (§ 89) in relation to the erection of poles and wires in the Tonawanda Reservation. It deals with allotted and unallotted lands. As to the former, which alone are involved on this appeal, the statute provides that "Any company may erect poles and wires, and other necessary fixtures thereto, across the lands of the Seneca Indians on the Tonawanda Reservation, provided the company shall pay to the Indians to whom allotments have been made, and on whose premises telephone or telegraph poles for the purpose of supporting wires, have been or may hereafter be erected, damages therefor, in case of inability to agree thereon, to be ascertained in the manner provided in the condemnation law by commissioners to be appointed by the Supreme Court in the manner provided by said condemnation law."

It thus appears that the defendant, before erecting its poles and stretching its wires, was obliged to agree with the plaintiff, or failing in that to resort to condemnation proceedings. Instead of following this statutory mode of procedure it made application to the council of the Tonawanda Indians and secured its permit on the payment of thirty dollars. This procedure was irregular and unauthorized, and the permit worthless.

The question was raised as to whether the plaintiff's title ran to the center of the highway. Plaintiff proved by uncontradicted evidence that such was the fact. It was also proved by uncontroverted evidence that at the meeting of the council, when the permit was obtained by the defendant, its representative agreed to settle with individual landowners.

The plaintiff, however, failed to prove any damages, and the trial judge directed the jury to find a verdict for six cents damages. Judgment was entered upon this verdict in favor of the plaintiff for the possession of the real estate described in the complaint, for six cents damages for withholding the property, and his costs, \$162.28. It was also adjudged that the plaintiff is the owner in fee and has the full Indian title as a member of the Tonawanda band of Seneca Indians to the property hereinafter described, subject to the easement of

N. Y. Rep.]

Statement of case.

the public therein for the purposes of travel. The Appellate Division affirmed the judgment, with \$99.43 costs.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, O'BRIEN, WERNER and CHASE, JJ. concur; HISCOCK, J. not sitting.

Judgment affirmed.

MATTHIAS H. ARNOT, as Trustee, Respondent, v. UNION SALT COMPANY, Appellant.

1. APPEAL — AFFIRMANCE OF JUDGMENT BY APPELLATE DIVISION — WHEN COURT OF APPEALS MAY REVERSE ORDER AFFIRMING JUDGMENT UPON EXCEPTIONS TO REFUSAL OF TRIAL COURT TO MAKE SPECIFIC FINDINGS OF FACT. Where the affirmance of a judgment of foreclosure by the Appellate Division is not unanimous, exceptions to refusals of the trial court to make certain findings of fact as requested by appellant may be considered by the Court of Appeals, and where the proposed findings are sustained by uncontradicted evidence, and the facts embodied therein are sufficient to relieve the appellant from liability, the judgment should be reversed and a new trial granted.

2. MORTGAGE FORECLOSURE — WHAT CONSTITUTES WAIVER OF PAYMENT OF INTEREST ON CORPORATE BONDS — WHEN SUCH WAIVER PRECLUDES ACTION TO FORECLOSE TRUST MORTGAGE FOR NON-PAYMENT OF INTEREST ON BONDS. Where it appears from uncontradicted evidence, upon the trial of an action to foreclose a trust mortgage given to secure the payment of the bonds of a domestic corporation and the interest thereon, that the holder of a majority of the bonds in value had consented, either before or when the time for the payment of the interest coupons arrived, to extend the time of such payment for a period which was not definitely fixed, such bondholder thereby waived strict payment of the interest, and is thereby precluded from insisting that a default had occurred under a clause in the mortgage providing that in case of any default in the payment of interest upon the bonds, or any of them, and the continuance of such default for six months, and if the holders of one-half in value of the outstanding bonds shall so elect and notify the trustee in writing of such election, the whole of such bonds shall become immediately due and payable, although the period limited in the bonds for the payment thereof shall not have expired; such waiver constitutes an insuperable obstacle to the maintenance of an action to foreclose the mortgage securing such bonds upon the demand of the bondholder making such waiver.

Arnot v. Union Salt Co., 109 App. Div. 488, reversed.

(Argued December 6, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 21, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alton B. Parker, O. P. Hurd and Philip P. Safford for appellant. The Appellate Division erred in holding that, assuming that the coupons were not presented, the mere non-payment of the coupons during the six months constituted a default. (*Matter of Young*, L. R. [31 Ch. Div.] 174; *H. V. R. R. Co., v. O'Connor*, 95 App. Div. 6; *McClelland v. N. S. Ry. Co.*, 110 N. Y. 469; *P. M. Co. v. Evans*, 84 Va. 717; *Davis v. N. Y. C. Co.*, 41 Hun, 492; *A. T. Co. v. C. W. Co.*, 72 App. Div. 539; *Albert v. G. I. Co.*, L. R. [3 Q. B.] 123; *U. T. Co. v. S. L., etc., Co.*, 5 Dill. 22; *De Groot v. McCotter*, 19 N. J. Eq. 531; *Cole v. Hines*, 81 Md. 476.) Even if plaintiff had presented his coupons he could not now be heard to claim a default, because he is estopped from so doing and he has waived any such claim. (*French v. Row*, 77 Hun, 380; *Levey v. U. P. Works*, 34 N. Y. 900; 124 N. Y. 664; *Broderick v. Smith*, 26 Barb. 539; *Ferris v. Ferris*, 28 Barb. 29; *Dwight v. Webster*, 32 Barb. 47; *Trenor v. Le Count*, 84 Hun, 426; *Weber v. Huerstel*, 11 Misc. Rep. 214; *Olmstead v. Wehle*, 18 Wkly. Dig. 486; *Hause v. Eisenlord*, 17 Wkly. Dig. 203; *Hunt v. Keech*, 3 Abb. Pr. 204.)

Frederick Collin for respondent. Clear and uncontradicted evidence sustains the findings of the trial court. (*M. Bank v. Elderkin*, 25 N. Y. 178; *F. Nat. Bank v. Crittenden*, 2 T. & C. 118; *Bank of Syracuse v. Hollister*, 17 N. Y. 46; *Nichols v. Goldsmith*, 7 Wend. 160; *Bank of U. S. v. Corneal*, 2 Pet. 543; *Gillett v. Averill*, 5 Den. 85; *Bailey v. Porter*, 12 M. & W. 44; 1 Daniel on Neg. Inst. [4th ed.]

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

§§ 656, 657; *Townsend v. Bell*, 167 N. Y. 462; *Dickerson v. Wason*, 47 N. Y. 439; *N. B. & D. Bank v. Hubbell*, 117 N. Y. 384.) The court properly refused to find that Arnot waived performance by defendant of its promise to pay the interest on July 1, 1904, or that he waived the default arising from defendant's failure to pay as promised and is estopped from taking advantage of such default. (*Le Gendre v. S. U. & N. Ins. Co.*, 183 N. Y. 392; *Sweet v. Henry*, 175 N. Y. 268; *S. B. I. Co. v. Merrill*, 108 Cal. 490; *Ripley v. Ins. Co.*, 30 N. Y. 136, 164; *Crandall v. Morton*, 24 App. Div. 547; *Armstrong v. A. Ins. Co.*, 130 N. Y. 560; *Decker v. Sexton*, 19 Misc. Rep. 59; *Sullivan v. P. Ins. Co.*, 172 N. Y. 482; *Libby v. Haley*, 91 Me. 331; *Shaw v. Spencer*, 100 Mass. 382.) The plaintiff's right to institute and prosecute this action to a judgment of foreclosure and sale was clear and beyond doubt. (*Malcolm v. Allen*, 49 N. Y. 448; *Bennett v. Stevenson*, 53 N. Y. 508; *Ferris v. Ferris*, 28 Barb. 29; *Reubens v. Prindle*, 44 Barb. 336; *Jones on Mortgages*, §§ 76, 1180, 1181, 1182; *Hale, Receiver, v. Gouverneur*, 4 Edw. Ch. 207; *Crane v. Ward*, Clarke's Ch. 393; *Rosche v. Kosmrowski*, 61 App. Div. 23; *Curran v. Houston*, 201 Ill. 442; *O'Connor v. Shipman*, 48 How. Pr. 126; *Valentine v. Van Wagner*, 37 Barb. 60.)

WILLARD BARTLETT, J. This is a suit to foreclose a mortgage made by the defendant corporation to the plaintiff as trustee to secure the payment of 200 bonds of the par value of \$500.00 each, and the coupons attached to the same representing interest payable thereon annually at the rate of five per cent per annum. The mortgage contains a provision that in case of any default by the Union Salt Co. in the payment of interest upon said bonds or any of them and the continuance of such default for six months "if the holders of one-half in value of the then outstanding bonds hereby intended to be secured shall so elect and notify the trustee in writing of such election the whole of the principal of all the bonds then outstanding shall forthwith

be declared by the trustee to be and shall immediately become due and payable, although the period limited in said bonds for the payment thereof shall not then have expired."

For some time prior to July 1, 1904, Matthias H. Arnot was the owner of 115 out of the 200 bonds of the Union Salt Co. of the par value of \$57,500. In June, 1904, his private secretary, Mr. Edward J. Dunn, cut from these bonds the coupons which were due on the ensuing 1st of July, and which were payable at the office of the Chemung Canal Trust Co. in the city of Elmira. On June 27, 1904, Mr. Dunn deposited these coupons with the Chemung Canal Trust Co. to the credit of Mr. Arnot. Although the Union Salt Co. had at the time on deposit with the Chemung Canal Trust Co. \$539.75 which might have been applied in part payment of Mr. Arnot's coupons, none of the coupons was paid; and on the 9th day of July, 1904, Mr. Arnot gave to the Chemung Canal Trust Co. a check to repay that institution for the credit which it had given to him on account of the coupons. Upon the delivery of this check to the receiving teller, he gave the coupons back to Mr. Dunn, who then replaced them among Mr. Arnot's securities.

Treating this transaction as a proper presentation of the coupons and a demand for payment thereof, upon which the Union Salt Co. had made default, Mr. Arnot on January 9, 1905, being then the holder of more than one-half in value of the then outstanding bonds of the Union Salt Co., served upon himself as trustee under the mortgage a notice that he elected to declare the whole of the principal of all of the bonds of said corporation then outstanding to be forthwith due and payable, and a request that the trustee should declare said principal to be forthwith due and payable, although the period limited in said bonds for the payment thereof had not expired; in pursuance of which request the trustee did, on the same date, declare the whole of the principal of all the bonds aforesaid to be immediately due and payable. On the basis of this action under what may be termed the acceleration clause of the mortgage the present foreclosure suit was insti-

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

tuted and has been successfully carried to judgment. That judgment has been affirmed by the Appellate Division, but its order does not show the affirmance to have been unanimous.

In this court the right of the plaintiff to a foreclosure of the mortgage under the acceleration clause is disputed on two grounds: *First*, on the ground that there is no evidence whatever to sustain the finding of the trial court to the effect that Mr. Arnot's coupons were so presented as to render their non-payment by the Chemung Canal Trust Co. a default on the part of the Union Salt Co. within the terms of the mortgage; and *secondly*, on the ground that the trial court should have found that, as requested by the defendant and established by uncontroverted evidence, Mr. Arnot acquiesced in an agreement which was entered into prior to July 1st, 1904, by all the other directors of the defendant corporation that they should all indefinitely delay the presentation for payment of their coupons payable on their face on July 1, 1904.

In the view which I take of the case it is necessary to consider only the second point.

In reference to this alleged agreement of forbearance or waiver the learned trial judge made the following finding of fact at the request of the defendant:

"10. That prior to July 1, 1904, all of defendant's directors, except plaintiff, viz., E. P. S. Wright, P. Halsey Hawes, Geo. S. Coon and Everett E. Buchanan, mutually agreed to withhold for an indefinite time presentation for payment of the coupons payable on their face July 1, 1904, attached to the bonds held by them respectively, which were a part of the issue of bonds set forth in the complaint herein."

The defendant further requested the court to make three additional findings of fact on this subject, all of which were refused, the defendant excepting in each instance to the refusal. These proposed additional findings are in the following words:

"11. That plaintiff was not present when said agreement was made, but that the same was made by all the other directors of defendant with the expectation that plaintiff would,

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.

upon being apprised thereof by said Buchanan, consent to withhold in like manner presentation for payment of his (plaintiff's) coupons payable on their face July 1, 1904, attached to the bonds of said issue held by plaintiff."

"12. That said Wright, Hawes and Coon made said agreement in reliance upon said Buchanan's promise to see plaintiff at once and notify said Wright, Hawes and Coon in case plaintiff should decline to acquiesce therein."

"13. That plaintiff thereafter did acquiesce in said agreement."

Inasmuch as the affirmance by the Appellate Division was not unanimous, the exception to the refusals to find as requested are available to the appellant in this court (*Le Gendre v. Scottish U. & N. Ins. Co.*, 183 N. Y. 392), and where it appears, as I think it does here, that the proposed findings are sustained by uncontradicted evidence, and that the facts which they embody suffice to relieve the appellant of liability, such exceptions of course demand a reversal of the judgment.

Three witnesses were called to testify in regard to the agreement mentioned in the 10th proposed finding: Mr. E. P. S. Wright, the president of the defendant corporation, Mr. P. Halsey Hawes, its secretary and treasurer, and Mr. E. E. Buchanan, a director. The agreement was made at the annual meeting of the stockholders of the Union Salt Co., which was held at Watkins, N. Y., on June 28, 1904. All the directors were present with the exception of Mr. Arnot, who was the vice-president. Being asked to state what was said at that meeting as to the coupons payable July 1, 1904, Mr. Wright testified: "Mr. Hawes said it would be difficult for the company to pay the bond interest at the present time due July 1, 1904; I also made the same statement to the directors and I stated and Mr. Hawes stated that we thought that the company would begin to make more money, get money back and be able to pay the bond interest later on, possibly in the fall. I said and Mr. Hawes said and Mr. Coon said and Mr. Buchanan said it would be better for all to waive the bond interest, and all the directors, including Mr.

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

Arnot, to waive the bond interest for the present, as it would cut our working capital too small at the time, but to pay the few outstanding coupons, which amounted to a trifle, something like \$200, but by mutual consent; that was what was stated; it was stated that by mutual consent we should do this." The witness being specifically interrogated as to what was said by those present in regard to the presentation of coupons due on the 1st of July, answered further: "They all agreed not to present their coupons. All the persons I have mentioned said at that meeting that they would not present their coupons for payment July 1st, 1904." At that time the witness and his wife owned bonds of the Union Salt Co. to the amount of \$4,500 par value upon which none of the coupons has ever been presented for payment.

It further appears from the testimony of Mr. Hawes that at the same meeting Mr. Buchanan, who had been made a director at the instance of Mr. Arnot and was an intimate personal acquaintance, said he would see Mr. Arnot and that he believed it would be satisfactory to Mr. Arnot to join with the rest of the directors in the arrangement and that he would let them know if there was any objection on Mr. Arnot's part. Neither the witness nor any other officer or director of the Union Salt Co., so far as he knew, had ever received any notice from Mr. Buchanan or from any one expressing any dissatisfaction by Mr. Arnot with the arrangement.

Mr. Hawes, the secretary and treasurer of the defendant corporation, was present in court and heard Mr. Wright's testimony as to who was present at the meeting and what was said there and he declared that Mr. Wright's statements were substantially correct and that he could not recall any matter in which his recollection varied from that of Mr. Wright. Mr. Arnot was not called as a witness at all; and the narrative of Mr. Hawes as to what occurred at the annual meeting is undisputed. The evidence thus clearly establishes the making of an agreement on the part of all the directors except Mr. Arnot that they would withhold the presentation of their coupons for the present until the financial condition of the

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.

defendant corporation should be more favorable and an undertaking on the part of Mr. Buchanan to endeavor to procure the assent of Mr. Arnot to this agreement and to inform his fellow-directors in case he should not succeed in doing so. Let us now inquire what the proof shows in regard to Mr. Arnot's attitude upon being informed of the agreement.

Mr. Buchanan testified that he told Mr. Arnot of the meeting in Watkins; that there was no money in the bank to pay the coupons and that Mr. Wright and Mr. Hawes wanted his permission to delay the payment of the coupons. In response to this information Mr. Arnot "talked about the condition of the affairs, what was done at the meeting and stated that they had made a good many promises to him that had not been fulfilled." According to Mr. Buchanan, "That was all that was said in regard to the coupons, that they had failed to keep their promises, and that he didn't think they would keep this promise, and that was all that was said about the coupons." The statements of this witness in regard to what was said by Mr. Arnot indicate that he was not disposed to place much reliance upon any assurances of increased corporate prosperity in the future, but in the language attributed to him on this occasion there is no clear manifestation of a refusal on his part to act with the other directors in withholding the demand upon the coupons. Other evidence in the case makes it quite plain, not only that there was no refusal by Mr. Arnot, but that he deliberately acquiesced in the agreement formulated by the other directors at the annual meeting at Watkins. Mr. Hawes describes a subsequent meeting of directors at which Mr. Arnot was present when there was a discussion concerning the coupons payable on July 1, 1904. The following extract from the testimony given by Mr. Hawes concerning this meeting shows that Mr. Arnot then recognized the existence of the agreement of forbearance and felt that he was bound by it.

"Q. State what Mr. Arnot said? A. He said he noticed that some coupons had been paid July 1st, and asked why it

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

was; that he thought we were all to wait for our interest, or words to that effect."

"Q. And what was said in reply to that question? A. I explained to Mr. Arnot that at the meeting, the stockholders' meeting at which this agreement had been made, that we had decided it would be better to pay the few outstanding coupons in order to prevent any talk from outsiders, and that only the directors were to withhold their presentation; that amounted to so little it was hardly worth while to hold them out, and with that explanation he seemed satisfied."

"Q. Did Mr. Arnot make any further remark regarding these July, 1904, coupons after you had made that explanation to him? A. No, sir."

Further evidence of Mr. Arnot's acquiescence, and, to my mind, the strongest of all, is to be found in his dealings in reference to his coupons with the Chemung Canal Trust Co. through his private secretary, Mr. Dunn. Mr. Arnot was himself the president of the trust company and, therefore, was presumably aware of the fact that the Union Salt Co. on July 1st, 1904, had upwards of \$500 on deposit in that institution applicable so far as that sum would go to the payment of his coupons. Nevertheless, instead of insisting upon such payment he voluntarily withdraws his coupons nine days after they were due and payable and proceeds to repay to the trust company the amount of the interest which had been credited to him on account thereof. This was the most practical manifestation possible of his intention to join with the other directors in waiting for payment until a season which should be more convenient for the Union Salt Co. That he had not until long thereafter any intention of claiming a default by reason of the non-payment of the coupons is apparent from a letter to Mr. Hawes, the defendant's secretary and treasurer, which is dated January 4th, 1905, and in which he says: "I am holding coupons cut from Union Salt Co. bonds which fell due Jan. 1st, 1905, and also July 1st, 1904, and they are at the present time unpaid. I should like to know what provision is being made to pay them?" It is hardly conceivable

Opinion of the Court, per WILLARD BARTLETT, J. [Vol. 186.

that such an inquiry as this would be made by a bondholder who supposed that the right to elect to declare due the whole of the principal sum secured by the mortgage had already accrued in his behalf.

The findings which the defendant requested and to which it was entitled upon the uncontradicted evidence on the subject lead unquestionably to the conclusion that upon this record the defense of waiver was established, that is to say, that Mr. Arnot as a holder of the majority of the bonds in value had consented either before or when the time for the payment of the coupons arrived to extend the time of such payment for a period which was not definitely fixed. Hence, there could be no default under the mortgage which would set running the term of six months, at the expiration of which the right would accrue to elect to declare the principal sum due. In the case of *Albert v. Grosvenor Investment Company* (L. R. [3 Q. B.] 123) the court had under consideration a bill of sale which provided that if the mortgagor should make "default" in payment of the sum of £62 10s. or any part thereof the whole amount should then be immediately due and payable; and COCKBURN, C. J., defined the term default to mean the non-payment by the party bound to pay without the consent of the parties having a right to waive the payment. "I see nothing," he said, "which goes to show that if by the consent of the person who is to receive payment the time for payment is extended, the omission to pay within the time specified must be a default within the meaning of the word in the bill of sale, and it would be monstrous to hold that it was a default, for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended and then come down upon him by insisting that there had been a default." A waiver of strict payment by extending the time in which it may be made is inconsistent with a claim that there has been a default which entitles a mortgagee to proceed under an acceleration clause in a bond and mortgage. "If the complainant has given further day of payment, or in any other way waived the

N. Y. Rep.] Opinion of the Court, per WILLARD BARTLETT, J.

payment according to the letter of the bond, the default contemplated and provided against has not happened." (*De Groot v. McCotter*, 19 N. J. Eq. 531.) Where a party entitled to enforce payment under a contract has consented to postpone the time of such payment, and the other party has acted upon such consent and in reliance thereon has permitted the contract time to pass without payment, the creditor may not treat the failure to pay within the time originally specified as a breach of the contract. (*Thomson v. Poor*, 147 N. Y. 402, 409.) No new consideration is required to support a waiver of payment upon a specified date (*Toplitz v. Bauer*, 161 N. Y. 325, 333), and the party who has thus waived strict payment cannot consider the other party in default unless he gives notice that he has withdrawn his waiver before the time for payment has arrived. (*Thomson v. Poor*, *supra*.) If the time for payment has been extended by the consent of the creditor, but no certain time is fixed for payment, the creditor cannot thereafter insist upon immediate payment under penalty of a forfeiture of the contract, but the debtor is entitled to a reasonable time after notice within which to perform.

To entitle the plaintiff to maintain this action it was essential to establish the fact that a default had occurred in the payment of the coupons which he owned as a bondholder on July 1, 1904; his acquiescence in the agreement made by his fellow-directors at the annual meeting of the Union Salt Co. amounted to a waiver of strict payment, which precluded him from insisting that a default had occurred at that time; and this waiver constituted an insuperable obstacle to the maintenance of the present action upon the proof contained in this record.

The judgment should be reversed and a new trial granted, costs to abide the final award of costs.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT and VANN, JJ., concur; CHASE, J., not sitting.

Judgment reversed, etc. •

MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

In the Matter of the Application of MILTON E. GIBBS,
Appellant, for a Writ of Mandamus against JOHN F.
O'BRIEN, as Secretary of State, Respondent.

Matter of Gibbs v. O'Brien, 115 App. Div. 881, affirmed.

(Argued September 28, 1906; decided October 1, 1906.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the third judicial department, entered Sep-
tember 26, 1906, which affirmed an order of Special Term
denying a motion for a peremptory writ of mandamus to
compel the secretary of state to issue a new or further cer-
tificate of the number of inhabitants in the two senate
districts of Monroe county.

George P. Decker for appellant.

Julius M. Mayer, Attorney-General (*William W. Arm-
strong* of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT,
VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

FRANK COUSINO, Respondent, v. WATERTOWN PAPER COMPANY,
Appellant.

Cousino v. Watertown Paper Co., 105 App. Div. 625, affirmed.

(Argued June 12, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the fourth judicial department, entered
May 12, 1905, affirming a judgment in favor of plaintiff
entered upon a verdict and an order denying a motion for a

new trial in an action to recover for personal injuries alleged to have been occasioned through defendant's negligence.

Thomas Burns for appellant.

George B. MacComber for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

JAMES SHANE, Respondent, *v.* NATIONAL BISCUIT COMPANY,
Appellant.

Shane v. National Biscuit Co., 102 App. Div. 188, affirmed.

(Argued June 13, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 18, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

Frank Gibbons and *Harry A. Talbot* for appellant.

Timothy G. Sheehan for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

CORNELIA W. BUTLER, as Trustee for CORNELIA B. LYON et al., Respondent, *v.* SUPREME COUNCIL AMERICAN LEGION OF HONOR, Appellant.

Butler v. Supreme Council Am. L. of H., 105 App. Div. 164, affirmed.

(Argued June 13, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 10, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term in an action to

recover upon a certificate of membership in a fraternal benefit society.

Henry A. Powell for appellant.

Maurice E. Page for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER and WILLARD BARTLETT, JJ: Not sitting: CHASE, J.

MORRIS FOX, Respondent, *v.* WARREN D. HOPKINS et al., as Executors of NELSON K. HOPKINS, Deceased, Appellants.

Fox v. Hopkins, 84 App. Div. 682, affirmed.

(Argued June 13, 1906; decided October 2, 1906.)

APPEAL from a judgment entered March 30, 1905, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action by a tenant to recover from his landlord damages caused by water leaking into the demised premises.

George Wadsworth for appellants.

Simon Fleischmann and *David Ruslander* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

CHARLES M. PRESTON, as Receiver of the NEW YORK BUILDING-LOAN BANKING COMPANY, Respondent, *v.* CAROLINE BRINLEY et al., Appellants, Impleaded with Others.

Preston v. Brinley, 106 App. Div. 593, affirmed.

(Argued June 14, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 11, 1906, modifying and affirming as modified a judgment in

favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for the foreclosure of a mortgage.

Alfred R. Page for appellants.

Charles W. Dayton for respondent.

Judgment affirmed, with costs, upon the ground that a new trial would be of no benefit to the appellants ; no opinion.

CONCUR: CULLEN, Ch. J, GRAY, EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
JOHN ROGERS, Appellant.

People v. Rogers, 112 App. Div. 921, affirmed.
(Argued June 14, 1906; decided October 2, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 20, 1906, affirming a judgment of the Kings County Court entered upon a verdict convicting the defendant of the crime of attempted grand larceny in the second degree.

George W. Martin for appellant.

John F. Clarke, District Attorney (Peter P. Smith of counsel), for respondent.

Judgment of conviction affirmed ; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE CITY
OF GENEVA, Respondent, *v.* GENEVA, WATERLOO, SENECA
FALLS AND CAYUGA LAKE TRACTION COMPANY, Appellant.

People ex rel. City of Geneva v. Geneva, W., S. F. & C. L. Co. Tr. Co.,
112 App. Div. 581, affirmed.
(Submitted June 18, 1906; decided October 2, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered

May 5, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to remove its railroad track from the side to the center of a certain street in the city of Geneva.

Charles A. Hawley and *Lansing G. Hoskins* for appellant.

W. Smith O'Brien for respondent.

Order affirmed, with costs, on authority of *City of Rochester v. Rochester City R. R. Co.* (183 N. Y. 99) and of *Chicago, Burlington & Quincy R. R. Co. v. State of Illinois* (decided by U. S. Supreme Court February 19, 1906); no opinion.

CONCUR: CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, J. Absent: O'BRIEN, J.

POLLY A. HOOD, as Administratrix of the Estate of ISAAC HOOD, Deceased, Appellant, *v.* THE LEHIGH VALLEY RAILROAD COMPANY, Respondent.

Hood v. Lehigh Valley R. R. Co., 109 App. Div. 418, affirmed.
(Argued June 18, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 27, 1905, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover for the alleged negligent killing of plaintiff's intestate.

William E. Prentice for appellant.

James McCormick Mitchell and *Chester Odiorne Swain* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J. Not sitting: HISCOCK, J.

PETER B. BRADLEY et al., Respondents, v. CHARLES F. BRIDGE et al., as Receivers of the BRADLEY SALT COMPANY, Respondents.

WALTER H. BRADLEY, Appellant, and EDWARD H., MORRIS et al., Respondents.

Bradley v. Bridge, 101 App. Div. 611, affirmed.
(Argued June 18, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered upon an order made November 15, 1904, affirming an interlocutory and a final judgment entered upon the report of a referee in an action to settle the rights of the plaintiffs and the defendants as to certain assets of the Bradley Salt Company.

P. M. French for appellant.

Horace McGuire for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: O'BRIEN, J. Not sitting: CHASE, J.

FRED D. MALDOON, Respondent, v. THE JEFFERSON POWER COMPANY, Appellant.

Maldoon v. Jefferson Power Company, 105 App. Div. 625, affirmed.
(Argued June 18, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 11, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

Francis K. Purcell for appellant.

Edgar V. Bloodough for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J. Not sitting: HISCOCK, J.

MARY H. MYER, Individually and as Trustee under the Will of CLARK S. SHARPSTEEN, Deceased, and as Guardian of MARY H. SHARPSTEEN, an Infant, Appellant, v. LEON ABBETT, as Executor of LEON ABBETT, Deceased, et al., Respondents, and MARY H. SHARPSTEEN, Appellant.

Myer v. Abbett, 105 App. Div. 537, affirmed.
(Argued June 18, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 27, 1905, modifying, and affirming as modified, a judgment in favor of respondents herein entered upon the report of a referee in an action for an accounting.

Edward W. S. Johnston and *Edward P. Orrell, Jr.*, for appellants.

Frederick H. Man, *Henry H. Man*, *Leon Abbett* and *Thomas J. Sanson* for respondents.

Judgment affirmed, with costs to each party respondent appearing by separate counsel and filing briefs; no opinion.

CONCUR: CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

EDGAR G. RUSSELL, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Russell v. N. Y. C. & H. R. R. Co., 105 App. Div. 636, affirmed.
(Argued June 19, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 5, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

Charles E. Patterson for appellant.

John B. Holmes for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., VANN, WERNER, WILLARD
BARTLETT and HISCOCK, JJ. Absent: O'BRIEN, J. Not
sitting: CHASE, J.

MINNIE CHOLET, as Administratrix of the Estate of HENRY
CHOLET, Deceased, Appellant, *v.* THE CITY OF SYRACUSE,
Respondent.

Cholet v. City of Syracuse, 111 App. Div. 908, affirmed.
(Argued June 19, 1906; decided October 2, 1906.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the fourth judicial department, entered
January 13, 1906, which reversed a judgment in favor of
plaintiff entered upon a verdict and an order denying a motion
for a new trial and granted a new trial in an action to recover
for the alleged negligent killing of plaintiff's intestate.

Ray B. Smith for appellant.

Walter W. Magee, Corporation Counsel (*William Nottingham*
of counsel), for respondent.

Order affirmed and judgment absolute ordered against
appellant on the stipulation, with costs in all courts; no
opinion.

Concur: CULLEN, Ch. J., VANN, WERNER and CHASE, JJ.
Absent: O'BRIEN, J. Dissenting: WILLARD BARTLETT, J.
Not sitting: HISCOCK, J.

MARY R. CODY, as Executrix of JAMES A. CAREY, Deceased,
Respondent, *v.* ROBERT H. HADCOX, Appellant.

Cody v. Hadcox, 109 App. Div. 912, affirmed.
(Argued June 19, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the fourth judicial department, entered

December 7, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on a promissory note.

Charles H. Searle for appellant.

P. C. J. De Angelis for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J. Not sitting: HISCOCK, J.

CHARLES N. SWIFT, Appellant, v. THE AMERICAN EXCHANGE
NATIONAL BANK, Respondent.

Swift v. American Exchange Nat. Bank, 103 App. Div. 610, affirmed.
(Argued June 20, 1906; decided October 2, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 26, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to impress upon funds in the hands of the defendant a judgment theretofore recovered by plaintiff against a certain corporation, assets of which, it was alleged, had been received by defendant.

Beno B. Gattell, Thomas D. Adams and George L. Carlisle for appellant.

Michael H. Cardozo for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ. Absent: O'BRIEN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY A. LA CHICOTTE, Appellant, v. GEORGE E. BEST, as Commissioner of Bridges of the City of New York, Respondent.

(Submitted October 1, 1906; decided October 2, 1906.)

Motion for re-argument denied. The case must be brought again to this court by a new appeal taken from the amended order. (See 185 N. Y. 600.)

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES E. J. KENNY, Respondent, v. THEODORE A. BINGHAM, as Police Commissioner of the City of New York, Appellant.

(Argued October 1, 1906; decided October 2, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 22, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel defendant to restore relator to active duty on the police force of the city of New York.

The motion was made on the ground that the order appealed from was entered on a stipulation and is, therefore, not appealable.

Alfred E. Sander for motion.

John J. Delany, Corporation Counsel (Theodore Connolly of counsel), opposed.

Motion denied, with ten dollars costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DANIEL J. REARDON, Respondent, v. THEODORE A. BINGHAM, as Police Commissioner of the City of New York, Appellant.

(Argued October 1, 1906; decided October 2, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial depart-

ment, entered June 22, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to restore the relator to active duty on the police force of the city of New York.

The motion was made on the ground that the questions involved were academic.

Alfred E. Sander for motion.

John J. Delany, Corporation Counsel (Theodore Connolly of counsel), opposed.

Motion denied, with ten dollars costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY HURLBUT, Respondent, v. THEODORE A. BINGHAM, as Police Commissioner of the City of New York, Appellant.

Reported below, 118 App. Div. 921.

(Argued October 1, 1906; decided October 2, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 22, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel defendant to restore the relator to active duty on the police force of the city of New York.

The motion was made on the ground that the questions involved were academic.

Alfred E. Sander for motion.

John J. Delany, Corporation Counsel (Theodore Connolly of counsel), opposed.

Motion denied, with ten dollars costs.

FREDERICK P. FOX et al., Appellants, v. NEW YORK CITY
INTERBOROUGH RAILWAY COMPANY, Respondent.

Fox v. New York City Interborough Ry. Co., 112 App. Div. 832, appeal dismissed.

(Argued October 3, 1906; decided October 9, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 6, 1906, which reversed an order of Special Term granting a motion for the continuance of an injunction *pendente lite*.

William W. Niles for appellants.

George W. Wickersham and *Noel Gale* for respondent.

Appeal dismissed, without costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

EBLING BREWING COMPANY, Respondent, v. NEW YORK CITY
INTERBOROUGH RAILWAY COMPANY, Appellant.

Ebling Brewing Co. v. New York City Interborough Ry. Co., 112 App. Div. 912, appeal dismissed.

(Argued October 3, 1906; decided October 9, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 6, 1906, which affirmed an order of Special Term granting a motion for the continuance of an injunction *pendente lite*.

George W. Wickersham and *Noel Gale* for appellant.

Harold Nathan for respondent.

Appeal dismissed, without costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

EMMA TEWES, Respondent, v. NORTH GERMAN LLOYD
STEAMSHIP COMPANY, Appellant.

Tewes v. North German Lloyd S. S. Co., 104 App. Div. 619, reversed.
(Argued May 21, 1906; decided October 9, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 4, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for a loss of baggage through the alleged negligence of defendant.

Joseph Larocque, Jr., for appellant.

Lyman W. Redington for respondent.

Judgment reversed and new trial granted, costs to abide event, unless plaintiff stipulates to reduce her recovery to the sum of fifty dollars, with interest from the date of the loss, with costs, in which event the judgment as reduced is affirmed, without costs of this appeal, on opinion in *Tewes v. North German Lloyd S. S. Co.* (186 N. Y. 151).

Concur: GRAY, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Dissenting: CULLEN, Ch. J., and HAIGHT, J.
Absent: O'BRIEN, J.

CHRISSIE BRINCK, Respondent, v. NORTH GERMAN LLOYD
STEAMSHIP COMPANY, Appellant.

Brinck v. North German Lloyd S. S. Co., 104 App. Div. 619, reversed.
(Argued May 21, 1906; decided October 9, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 4, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for a loss of baggage through the alleged negligence of defendant.

Joseph Larocque, Jr., for appellant.

Lyman W. Redington for respondent.

Judgment reversed, new trial granted, costs to abide event, unless plaintiff stipulates to reduce her recovery to the sum of fifty dollars, with interest from the date of the loss, with costs, in which event the judgment as reduced is affirmed, without costs of this appeal, on opinion in *Tewes v. North German Lloyd S. S. Co.* (186 N. Y. 151).

CONCUR: GRAY, EDWARD T. BARTLETT, WERNER and HISCOCK, JJ. Dissenting: CULLEN, Ch. J., and HAIGHT, J. Absent: O'BRIEN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
ANTONIO STROLLA, Appellant.

(Argued October 1, 1906; decided October 9, 1906.)

MOTION to dismiss an appeal from a judgment of the Supreme Court, rendered April 30, 1906, at a Trial Term for the county of New York, upon a verdict convicting the defendant for the crime of murder in the first degree.

The motion was made on the grounds that the appellant had failed to file the return or taken any steps to prosecute the appeal.

William Travers Jerome, District Attorney (*Robert C. Taylor* of counsel), for motion.

James E. Brande opposed.

Counsel for the defendant assigned at the time of his arraignment continues until the disposition of the appeal, unless such counsel voluntarily withdraw from the case or the relations as counsel are otherwise terminated. A new assignment of counsel is now unnecessary. Motion to dismiss appeal denied. Appeal to be perfected in sixty days; in default thereof the district attorney is at liberty to renew the motion to dismiss.

EIGHTH WARD BANK OF BROOKLYN, Respondent, *v.* JAMES G. McLOUGHLIN et al., as Executors of JOHN McLOUGHLIN, Deceased, Appellants.

Eighth Ward Bank of Brooklyn v. McLoughlin, 113 App. Div. 750, appeal dismissed.

(Argued October 1, 1906; decided October 9, 1906)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 13, 1906, affirming a judgment in favor of plaintiff entered upon a verdict.

The motion was made upon the ground that the judgment was not appealable under subdivision 4 of section 191 of the Code of Civil Procedure.

Paul Grout for motion.

Cleveland F. Bacon opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

KNICKERBOCKER TRUST COMPANY, as Trustee, Respondent, *v.* ONEONTA, COOPERSTOWN AND RICHFIELD SPRINGS RAILWAY COMPANY, Defendant, and EDGAR P. HOLDRIDGE, Appellant, Impleaded with Others.

Knickerbocker Trust Co. v. Oneonta, C. & R. S. Ry. Co., 111 App. Div. 812, appeal dismissed.

(Submitted October 1, 1906; decided October 9, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered June 7, 1906, which affirmed an order of Special Term granting a motion for leave to intervene in the above-entitled proceeding.

The motion was made on the grounds that the order appealed from was not a final order in a special proceeding,

but was discretionary, and the Court of Appeals had, therefore, no jurisdiction to entertain the appeal.

Charles E. Hotchkiss for motion.

No one opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

LOUIS H. GEIN, Respondent, *v.* WILLIAM MCCARTY LITTLE,
Appellant, Impleaded with Another.

Gein v. Little, 102 App. Div. 614, appeal dismissed.
(Argued October 1, 1906; decided October 9, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 17, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The motion was made upon the ground that the judgment was not appealable to the Court of Appeals, the action being upon an individual bond, the judgment of the Appellate Division being unanimous and permission to appeal not having been granted.

Lynn W. Thompson for motion.

Alexander Thain opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

FRANCIS M. SCALION et al., Respondents, *v.* THE MANHATTAN
RAILWAY COMPANY et al., Appellants.

(Submitted October 1, 1906; decided October 9, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 185 N. Y. 359.)

MARIA HOUSE et al., Respondents, v. LUCIAN C. CARR, as Administrator of the Estate of CYNTHIA GILBERT, Deceased, Appellant.

(Submitted October 1, 1906; decided October 9, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 185 N. Y. 453.)

WILMOT L. MOREHOUSE, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant, Impleaded with Another.

(Submitted October 1, 1906; decided October 9, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 185 N. Y. 520.)

JAMES SNYDER, Appellant, v. MONROE ECKSTEIN BREWING COMPANY, Respondent, Impleaded with Others.

Reported below, 107 App. Div. 328.

(Submitted October 1, 1906; decided October 9, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 20, 1905, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The motion was made on the grounds that the appellant's exceptions were frivolous, no question of law was presented for review, and that the judgment of the Appellate Division was unanimous.

William D. Gaillard for motion.

Henry W. Rianhard opposed.

Motion denied, with ten dollars costs.

**MARY BRECHTLEIN, Respondent, v. THE GREENWOOD
CEMETERY, Appellant.**

Reported below, 118 App. Div. 911.

(Argued October 1, 1906; decided October 9, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 18, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the grounds of lack of prosecution and lack of jurisdiction in the Court of Appeals to entertain the appeal.

Francis J. Keurzi for motion.

George A. Miller opposed.

Motion denied on the ground that the motion cannot be made until the action is continued in the name of the personal representatives of the plaintiff.

**J. ALFRED KING et al., Respondents, v. THE GERMAN-AMERICAN
BANK OF BUFFALO, Appellant.**

King v. German-American Bank of Buffalo, 102 App. Div. 619, appeal dismissed.

(Argued October 1, 1906; decided October 9, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered upon an order made March 1, 1905, affirming a judgment in favor of plaintiffs entered upon the report of a referee. The motion was made upon the grounds that the appeal was frivolous, no questions of merit being involved therein.

Moses Shire for motion.

William C. Carroll opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

ALEXANDER J. SCOTT, as Administrator of the Estate of JOSEPH J. SCOTT, Respondent, *v.* NINA SPENCER et al., Appellants, Impleaded with Others.

Scott v. Spencer, 106 App. Div. 614, appeal dismissed.]
(Argued October 1, 1906; decided October 9, 1906.)

MOTION to dismiss an appeal from a judgment, entered July 6, 1905, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which affirmed an interlocutory judgment of Special Term overruling demurrers to the complaint.

The motion was made upon the ground that the judgment appealed from was not a final judgment under section 190 of the Code of Civil Procedure, and the Court of Appeals had no jurisdiction to review the same.

Ernest P. Seelman for motion.

Alvan R. Johnson opposed.

Motion granted and appeal dismissed, without costs.

MORRIS FOGEL, an Infant, by SAMUEL FOGELNEST, His Guardian ad Litem, Respondent, *v.* INTERBOROUGH RAPID TRANSIT COMPANY, Appellant.

(Argued October 1, 1906; decided October 9, 1906.)

Motion to amend remittitur so as to conform with memorandum of decision granted. (See 185 N. Y. 562.)

In the Matter of Judgment Moneys Recovered in Action of COUNT W. WEEKS *v.* E. HOLLOWAY COE, as Executor of E. FRANK COE, Deceased.

OAKLEY WEEKS, Appellant; HENRY M. WHITEHEAD, Respondent.

Matter of Weeks v. Coe, 112 App. Div. 888, appeal dismissed.
(Argued October 1, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

March 2, 1906, which reversed an order of Special Term requiring the respondent herein to deposit in a certain trust company moneys received by him in the above-entitled action, of which he was attorney for the plaintiff.

A. P. Bachman for appellant.

Thaddeus D. Kenneson for respondent.

Appeal dismissed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WEENER, WILLARD BARTLETT and CHASE, JJ.

FLORENCE NUNNALLY, Respondent, *v.* NEW YORKER STAATS-ZEITUNG, Appellant.

Nunnally v. New Yorker Staats-Zeitung, 111 App. Div. 482, affirmed. (Argued October 1, 1906; decided October 16, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 9, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint in an action for libel.

The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

William J. Amend, John E. Donnelly and Alfred J. Amend for appellant.

George H. D. Foster for respondent.

Order affirmed, with costs, on opinion of PATTERSON, J., below. Question certified answered in the affirmative.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WEENER, WILLARD BARTLETT and CHASE, JJ.

FLORENCE NUNNALLY, Respondent, *v.* THE TRIBUNE ASSOCIATION, Appellant.

Nunnally v. Tribune Association, 111 App. Div. 485, affirmed.
(Argued October 1, 1906; decided October 16, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 9, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint in an action for libel.

The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?"

Henry W. Sackett and *Edward L. Stevens* for appellant.

George H. D. Foster for respondent.

Order affirmed, with costs, on opinion of PATTERSON, J. below; question certified answered in the affirmative.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

METROPOLITAN MILK AND CREAM COMPANY, Appellant, *v.* THE CITY OF NEW YORK et al., Respondents.

Metropolitan Milk & Cream Co. v. City of New York, 113 App. Div. 377, affirmed.
(Argued October 1, 1906; decided October 16, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 25, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to an affirmative defense.

The following questions were certified: "Is the separate defense contained in the answer of the defendant The City of New York, and numbered VIII, insufficient in law upon the face thereof?"

"Is the separate defense contained in the answer of the

defendant The Department of Health of the City of New York, and numbered VIII, insufficient in law upon the face thereof?"

John J. Lenehan for appellant.

John J. Delany, Corporation Counsel (Theodore Connolly and Royal E. T. Riggs of counsel), for respondents.

Order affirmed, with costs; questions certified answered in the negative; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Estate of HENRY WATERMAN, Deceased.
JULIA KENYON, Appellant; SAMUEL H. COOMBS et al., as
Executors of HENRY WATERMAN, Deceased, Respondents.

Matter of Waterman, 112 App. Div. 318, appeal dismissed.
(Argued October 2, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 27, 1906, which reversed a decree of the Kings County Surrogate's Court removing two of the executors of the will of Henry Waterman, deceased.

Thaddeus D. Kenneson, Ralph W. Kenyon and Charles H. Kelby for appellant.

Robert H. Wilson for respondents.

Appeal dismissed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Application of EUGENE P. O'ROURKE, Appellant, for a Writ of Mandamus against THEODORE A. BINGHAM, as Police Commissioner of the City of New York, Respondent.

Matter of O'Rourke v. Bingham, 118 App. Div. 919, affirmed.
(Submitted October 2, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 16, 1906, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to grade the petitioner in the police department of the city of New York as of certain grades on certain dates, and to make the necessary warrant and payroll so as to enable his recovery of back pay.

R. Percy Chittenden for appellant.

John J. Delany, Corporation Counsel (*James D. Bell* of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

HUDSON AND MANHATTAN RAILROAD COMPANY, Respondent,
v. JOSEPHINE J. S. WENDEL, Appellant, Impleaded with
Others.

Hudson & Manhattan R. R. Co. v. Wendel, 112 App. Div. 822, affirmed.
(Argued October 2, 1906; decided October 16, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 17, 1906, which affirmed an order of Special Term denying a motion to dismiss a proceeding to acquire certain property by condemnation, and referred the issues raised by the petition and the answers thereto.

The following questions were certified: "1. Can the petitioner, respondent, upon the facts alleged in the petition herein, maintain a proceeding to acquire by condemnation the property of the appellant, Josephine J. S. Wendel, in said petition described?"

"2. Should the preliminary motion made by the defendant Josephine J. S. Wendel to dismiss this proceeding as to her, which said motion is recited in the order of the Special Term of the Supreme Court dated February 6, 1906, and entered in the office of the clerk of the county of New York on the 7th day of February, 1906, have been granted?"

Lewis L. Delafield for appellant.

F. B. Jennings for respondent.

Order affirmed, with costs; first question certified answered in the affirmative; second question certified answered in the negative; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Application of JOHN B. WEBSTER, Appellant, for the Resubmission of Local Option Questions to the Electors of the Town of Hanover.

THE STATE COMMISSIONER OF EXCISE, Respondent.

Matter of Webster, 113 App. Div. 888, affirmed.
(Argued October 2, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 2, 1906, which affirmed an order of the Chautauqua County Court denying the application herein.

E. C. Randall for appellant.

Daniel A. Reed and *Royal R. Scott* for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Application of CARRIE R. SCHROEDER, as General Guardian for PHILIS L. SCHROEDER, Respondent, for a Compulsory Accounting by LORA C. SCHROEDER, as Administratrix of the Estate of EDWIN A. SCHROEDER, Deceased, Appellant.

In the Matter of the Accounting of LORA C. SCHROEDER, as Administratrix of the Estate of EDWIN A. SCHROEDER, Deceased.

Matter of Schroeder, 118 App. Div. 204; 114 App. Div. 905, affirmed. (Argued October 2, 1906; decided October 16, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 5, 1906, which modified and affirmed as modified an order of the New York County Surrogate's Court made in the above-entitled proceedings.

The following questions were certified: "1. Is the administratrix, under the evidence presented to the surrogate, liable to account for the money which she received from the officers of the Schroeder & Arguimbau corporation?"

"2. Was the surrogate justified in overruling the referee's finding with respect to the moneys paid to the administratrix by the officers of the Schroeder & Arguimbau corporation, and in finding that the said moneys belonged to and formed a part of the estate of which she is administratrix and in charging her therewith as an asset of the estate?"

Charles M. Demond for appellant.

Henry De Forest Baldwin for respondent.

Order affirmed, with costs; questions certified answered in the affirmative; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HENRY HURLBUT, Respondent, *v.* THEODORE A. BINGHAM, as Police Commissioner of the City of New York, Appellant.

NEW YORK CITY — POLICE DEPARTMENT. The limitation on the time to commence a proceeding contained in section 302 of the charter of the city of New York (L. 1901, ch. 466) does not apply to a proceeding to restore to active duty a member of the police force who has been retired on account of alleged physical incapacity.

People ex rel. Hurlbut v. Bingham, 118 App. Div. 921, affirmed.

(Argued October 3, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 22, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to restore the relator to active duty on the police force of the city of New York.

John J. Delany, Corporation Counsel (*James D. Bell* and *Patrick E. Callahan* of counsel), for appellant.

Alfred E. Sander for respondent.

Per Curiam. We are of the opinion that the limitation on the time to commence a proceeding, contained in section 302 of the New York city charter, does not apply to a proceeding to restore to active duty a member of the police force who has been retired on account of alleged physical incapacity. The claim that the relator was guilty of laches in commencing this proceeding, and that he has waived any right to relief herein present questions of fact which, although they might have been determined otherwise, have been determined in the relator's favor by the court at Special Term, and such determination has been unanimously affirmed by the Appellate Division. We cannot review such questions of fact.

The order should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DANIEL J. REARDON, Respondent, v. THEODORE A. BINGHAM, as Police Commissioner of the City of New York, Appellant.

(Argued October 8, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 22, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel defendant to restore relator to active duty on the police force of the city of New York.

John J. Delany, Corporation Counsel (James D. Bell of counsel), for appellant.

Alfred E. Sander for respondent.

Order affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES E. J. KENNY, Respondent, v. THEODORE A. BINGHAM, as Police Commissioner of the City of New York, Appellant.

(Argued October 8, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 22, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to restore the relator to active duty on the police force of the city of New York.

John J. Delany, Corporation Counsel (James D. Bell of counsel), for appellant.

Alfred E. Sander for respondent.

Order affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Application of HENRY C. PITNEY et al.,
as Trustees under the Will of CATHARINE C. HALSTED,
Deceased, Respondent.

CHARLES S. HALSTED, Appellant.

Matter of Pitney, 118 App. Div. 845, modified.

(Argued October 8, 1906; decided October 16, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 5, 1906, which modified and affirmed an order of Special Term granting the application of Henry C. Pitney and James M. Halsted to be discharged as trustees under the will of Catharine C. Halsted, deceased, settling their accounts and appointing a new trustee.

George W. Carr for appellant.

Edgar J. Nathan for trustees, respondents.

William T. Gilbert for Charles C. Lockwood, as special guardian, respondent.

Per Curiam. The selection of a new or substituted trustee rested in the discretion of the Supreme Court and is not subject to review by this court.

It is extremely doubtful, to say the least, whether the infant has any interest in the corpus of the trust fund. Therefore, the compensation for the services of the guardian was necessarily limited to taxed costs and the court was not authorized to make him an allowance. (*Matter of Holden*, 126 N. Y. 589; *Matter of Robinson*, 40 App. Div. 30; *affd.*, 160 N. Y. 448.)

The order appealed from should be modified so as to strike out the allowance to the guardian *ad litem*, and in lieu thereof direct that said guardian be paid his costs to be taxed, and as modified affirmed, without costs of this appeal to either party.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Ordered accordingly.

ALEXANDER R. GROSSMAN, Respondent, v. CONSOLIDATED GAS
COMPANY OF NEW YORK, Appellant.

Grossman v. Consolidated Gas Co., 114 App. Div. 242, affirmed.
(Argued October 5, 1906; decided October 16, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 26, 1906, which affirmed an order of Special Term granting a motion for an injunction *pendente lite* herein.

The following questions were certified: "1. Whether or not the Supreme Court has jurisdiction to entertain this action;

"2. Whether or not, if the Supreme Court did have jurisdiction to entertain this action, it ought to have entertained jurisdiction in view of the principle of comity."

Joseph H. Choate and *John A. Garver* for appellant.

Clarence J. Shearn for respondent.

Order affirmed, with costs, and questions certified answered to the effect that the Supreme Court has jurisdiction of this action and that there is nothing in the principle of comity that prohibits the exercise of that jurisdiction, on opinion in *Richman v. Consolidated Gas Co.* (186 N. Y. 209).

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

ARTHUR W. SMITH et al., Respondents, v. LONDON ASSURANCE
CORPORATION, Appellant.

Smith v. London Assur. Corpn., 114 App. Div. 868, appeal dismissed.
(Submitted October 8, 1906; decided October 16, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial

department, entered July 24, 1906, which reversed an order of Special Term granting a motion for a compulsory order of reference.

The motion was made upon the grounds that the papers served were defective and that permission to appeal had not been obtained.

McFarland, Taylor & Costello for motion.

Willard Parker Butler opposed.

Motion granted and appeal dismissed, with costs.

FERDINAND S. M. BLUN, Respondent, v. REBECCA MAYER
et al., Appellants. (Actions Nos. 1 and 2.)

Reported below, 118 App. Div. 242; 118 App. Div. 247.
(Argued October 1, 1906; decided October 16, 1906.)

MOTION to dismiss appeals from judgments of the Appellate Division of the Supreme Court in the first judicial department, entered May 20, 1906, modifying and affirming as modified judgments in favor of plaintiff entered upon reports of a referee.

The motion was made upon the grounds that the Appellate Division had unanimously decided that there was evidence tending to sustain the findings of fact, and no questions of law were presented for review.

Charles Edward Souther for motion.

Louis Marshall opposed.

Motion denied, with ten dollars costs.

GUSTAVE E. WALTER, Respondent, v. ROSALIE RAFALSKY et al., Appellants, Impleaded with Another.

Walter v. Rafalsky, 118 App. Div. 223, affirmed.
(Argued October 3, 1906; decided October 23, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 11, 1906, which reversed an interlocutory judgment of Special Term sustaining a demurrer to the complaint and overruled such demurrer in an action to recover upon a written contract.

The following question was certified: "Does the complaint state a cause of action against the demurring defendants?"

Frank M. Avery and *Edgar J. Phillips* for appellants.

Walter Carroll Low for respondent.

Order affirmed, with costs, on opinion below. Question certified answered in the affirmative.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and CHASE, JJ. Not voting: VANN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. SIXTY WALL STREET, Appellant, v. OTTO KELSEY, as Comptroller of the State of New York, Respondent.

People ex rel. Sixty Wall Street v. Kelsey, 114 App. Div. 909, affirmed.
(Argued October 3, 1906; decided October 23, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 11, 1906, which affirmed a determination of the defendant in assessing a franchise tax against the relator.

Sanford Robinson and *Guy Fairfax Cary* for appellant.

Julius M. Mayer, Attorney-General (*Horace McGuire* of counsel), for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Accounting of MARTIN J. KEOGH, as Trustee under the Will of DAVID JONES, Deceased, Respondent.

ATALA W. THAYER et al., Appellants.

Matter of Keogh, 112 App. Div. 414, affirmed.
(Argued October 3, 1906; decided October 23, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 20, 1906, which modified and affirmed as modified a decree of the Westchester County Surrogate's Court settling the accounts of Martin J. Keogh as trustee under the will of David Jones, deceased.

Louis Marshall and *David McClure* for appellants.

Walter R. Beach, *Charles M. Cannon*, *Wilfred N. O'Neil* and *Herbert B. Shoemaker* for respondent.

Order affirmed on opinion below, with costs to each party appearing by separate attorney and filing briefs payable out of the estate.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

WILLIAM HORRMANN et al., as Trustees under the Will of JOSEPH RUBSAM, Deceased, Plaintiffs; v. CORNELIUS FERGUSON, JR., as Executor of JOSEPH STEHLIN, Deceased, et al., Respondents.

RUBSAM & HORRMANN BREWING COMPANY, Appellant;
MAMIE CURBAN et al., Respondents.

Horrmann v. Ferguson, 112 App. Div. 920, affirmed.
(Argued October 3, 1906; decided October 23, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

April 20, 1906, which affirmed an order of Special Term confirming the report of a referee in surplus money proceedings.

William D. Gaillard and *Thomas G. Prioleau* for appellant
George C. Case for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF NEW YORK, Respondent, v. ELIZABETH LYON, Individually and as Executrix of HENRY HART, Deceased, et al., Appellants.

People ex rel. City of New York v. Lyon, 114 App. Div. 583, affirmed.
(Argued October 3, 1906; decided October 23, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 23, 1906, which reversed a determination of the board of assessors of the city of New York in a proceeding to recover damages for an alleged change of grade.

Ernest Hall and *Thomas S. Bassford* for appellants.

John J. Delany, Corporation Counsel (*Theodore Connoly* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Probate of the Will of SHERMAN D. PILSBURY, Deceased.

EDWIN M. PILSBURY et al., Appellants; LENA M. PILSBURY et al., Respondents.

Matter of Pilsbury, 113 App. Div. 893, affirmed.
(Argued October 3, 1906; decided October 23, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May

8, 1906, which affirmed a decree of the Albany County Surrogate's Court admitting to probate and construing the will of Sherman D. Pilsbury, deceased.

James R. Bowen for appellants.

William E. Woollard for Lena M. Pilsbury, respondent.

Martin T. Nachtmann for Jessie I. P. Foll, respondent.

Order affirmed, with costs to each respondent appearing separately by counsel and arguing or filing briefs; no opinion.

Concur: EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ. Dissenting: CULLEN, Ch. J., and WILLARD BARTLETT, J.

ADDIE A. ALLEN, Appellant, v. ALBERT H. PIERSON et al.,
Respondents.

Allen v. Pierson, 113 App. Div. 586, affirmed.
(Argued October 4, 1906; decided October 23, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 2, 1906, which reversed an interlocutory judgment of Special Term overruling a demurrer to the complaint in an action for the foreclosure of a mortgage.

The following questions were certified:

"*First.* Does it appear from the face of said complaint that the plaintiff has not legal capacity to sue, as alleged in the defendants' demurrer?"

"*Second.* Does the complaint state facts sufficient to constitute a cause of action?"

Henry E. Miller and *Charles E. Opdyke* for appellant.

George E. Zartman for respondents.

Order affirmed, with costs; first question withdrawn; second question answered in the negative; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Application of JOSEPH H. ADOLPH et al., Respondents, to Lay Out a Highway in the Town of Highlands.

ESEK C. CARPENTER, Appellant.

Matter of Adolph, 102 App. Div. 871, affirmed.
(Argued October 4, 1906; decided October 23, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 10, 1905, which affirmed an order of the Orange County Court directing the laying out and opening of a certain highway in the town of Highlands.

Robert H. Barnett for appellant.

A. H. F. Seeger for respondents.

Order affirmed, with costs, on opinion below.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ. Not sitting: WILLARD BARTLETT, JJ.

In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of GEORGE T. HANFORD, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;
THE PEOPLE OF THE STATE OF NEW YORK ex rel. LAURA H. BRIGGS, Respondent.

Matter of Hanford, 113 App. Div. 894, affirmed.
(Argued October 4, 1906; decided October 23, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered June 6, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the state comptroller to pay interest on moneys wrongfully col-

lected as a transfer tax on the estate of George T. Hanford, deceased.

Edmond C. Alger and *A. A. Yates* for appellant.

Edwin C. Angle for respondent.

Order affirmed, with costs, on authority of *Matter of Berry* (179 N. Y. 285).

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WEENER, WILLARD BARTLETT and CHASE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE TROY PRESS COMPANY, Respondent, v. THE COMMON COUNCIL OF THE CITY OF TROY et al., Defendants, and EVENING STANDARD PUBLISHING COMPANY, Appellant.

People ex rel. Troy Press Co. v. Common Council of City of Troy, 114 App. Div. 354, modified.

(Argued October 4, 1906; decided October 23, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 7, 1906, which annulled a determination of the common council of the city of Troy designating official newspapers in said city, and directed the said common council to meet and designate official newspapers according to law.

John T. Norton for appellant.

William J. Roche for respondent.

Order modified by striking out the provision for meeting and designation by the common council, and as modified affirmed, without costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Appraisal, under the Transfer Tax Act,
of the Estate of EMILY M. LORD, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant
and Respondent; FRANKLIN B. LORD et al., Respondents
and Appellants.

Matter of Lord, 111 App. Div. 152, affirmed.
(Argued October 4, 1906; decided October 23, 1906.)

CROSS-APPEALS from an order of the Appellate Division of
the Supreme Court in the first judicial department, entered
February 9, 1906, which modified and affirmed as modified
an order of the New York County Surrogate's Court assess-
ing a transfer tax on the estate of Emily M. Lord, deceased.

Jabish Holmes, Jr., and *Emmet R. Olcott* for state
comptroller.

Lucius H. Beers for Franklin B. Lord et al.

Order affirmed, without costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT,
VANN, WEBNER, WILLARD BARTLETT and CHASE, JJ.

In the Matter of CONSTANT WEBSTER et al., as Commissioners
of Highways of the Town of Chatham, Appellants, against
PHILIP PURCELL, as Commissioner of Highways of the
Town of Kinderhook, Respondent.

Matter of Webster v. Purcell, 106 App. Div. 360, affirmed.
(Submitted October 4, 1906; decided October 23, 1906.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the third judicial department, entered July
6, 1905, which affirmed an order of Special Term denying an
application of the commissioners of highways of the town of
Chatham for an order requiring the commissioner of high-
ways of the town of Kinderhook to join in the repair of a
bridge over a stream dividing said towns.

Sanford W. Smith for appellants.

Frank S. Becker for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: CHASE, J.

SUSAN G. ERWIN, Appellant, *v.* ERIE RAILROAD COMPANY,
Respondent.

Erwin v. Erie R. R. Co., 98 App. Div. 403, affirmed.
(Argued October 8, 1906; decided October 23, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 9, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover damages caused by the deflection of waters on to plaintiff's land.

Francis E. Wood for appellant.

George N. Orcutt for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

ALBERT J. BARNES, Respondent, *v.* EUGENE B. HOWELL, as Receiver of LONG ISLAND REAL ESTATE EXCHANGE AND INVESTMENT COMPANY, Appellant, and THE PEOPLE'S TRUST COMPANY, Respondent.

Barnes v. Long Island R. E. Exchange & Inv. Co., 107 App. Div. 623, affirmed.

(Argued October 8, 1906; decided October 23, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

September 6, 1905, which affirmed a judgment in favor of plaintiff and the defendant People's Trust Company entered upon a decision of the court on trial at Special Term in an action to obtain the cancellation of a mortgage alleged to have been paid to the mortgagee without notice of its previous assignment.

Robert H. Wilson for appellant.

L. E. Warren for plaintiff, respondent.

George W. Wingate for defendant, respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ. Absent: GRAY, J.

AMALIA E. LAUTZ et al., Respondents, v. FRANK F. WILLIAMS, Respondent, and CHARLES F. SHAW et al., as Executors of EDMUND R. SHAW, Deceased, Appellants, Impleaded with Others.

Lautz v. Williams, 102 App. Div. 619, affirmed.
(Argued October 8, 1906; decided October 23, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 10, 1905, which affirmed a judgment of Special Term overruling exceptions to the report of a referee in an action for the foreclosure of a mortgage and directing judgment for a deficiency arising on said foreclosure.

Nathaniel W. Norton for appellants.

Adelbert Moot and *Charles M. Hughson* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

NATHAN W. HORNING, Respondent, v. HUDSON RIVER TELEPHONE COMPANY et al., Appellants.

Horning v. Hudson River Telephone Co., 111 App. Div. 122, affirmed.
(Argued October 8, 1906; decided October 23, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 13, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through the negligence of defendants.

Mark Cohn, Fred Linus Carroll and John A. Delehanty for appellants.

Andrew J. Nellis for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and HISCOCK, JJ. Absent: GRAY, J. Not sitting: CHASE, J.

ELIZABETH L. ELY et al., Respondents, v. CHARLES W. DUMONT, Appellant.

Ely v. Dumont, 103 App. Div. 640, affirmed.
(Submitted October 9, 1906; decided October 23, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 19, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover on a contract for tuition.

Alexander S. Bacon for appellant.

Charles P. Cowles and Justus A. B. Cowles for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ. Absent: GRAY, J.

GEORGE B. JOHNSTON, Respondent, v. LONG ISLAND
INVESTMENT AND IMPROVEMENT COMPANY, Appellant.

Johnston v. Long Island Inv. & Impr. Co., 104 App. Div. 619, affirmed.
(Argued October 9, 1906; decided October 23, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 8, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a contract.

A. G. N. Vermilya for appellant.

F. E. Dana for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT,
VANN, HISCOCK and CHASE, JJ. Absent: GRAY, J.

WILLIAM KELLY, Respondent, v. SECURITY MUTUAL LIFE
INSURANCE COMPANY, Appellant.

(Submitted October 15, 1906; decided October 23, 1906.)

Motion for re-argument denied, with ten dollars costs. (See
186 N. Y. 16.)

FRANK W. GORETH, as Administrator of the Estate of THOMAS
KEIHER, Deceased, Respondent, v. JACOB R. SHIPHERD,
Appellant.

Goreth v. Shipherd, 92 App. Div. 611, appeal dismissed.
(Submitted October 15, 1906; decided October 23, 1906.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 4, 1904, which affirmed an order of Special Term denying a motion for the vacation of certain orders of discontinuance.

The motion was made upon the ground that the appeal was unauthorized, permission to appeal not having been obtained.

Charles H. Strong for motion.

No one opposed.

Motion granted and appeal dismissed; without costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
WILLIAM NELSON, Appellant.

(Submitted October 15, 1906; decided October 28, 1906.)

MOTION to dismiss an appeal from a judgment of the Supreme Court, rendered April 9, 1906, at a Trial Term for the county of New York upon a verdict convicting the defendant of the crime of murder in the first degree.

The motion was made on the grounds that the appellant had failed to serve a proposed case, file any return or take any steps toward the prosecution of the appeal.

William Travers Jerome, District Attorney (*Alexander A. Mayer* of counsel), for motion.

No one opposed.

Motion denied. Appeal to be perfected in sixty days; in default thereof the district attorney is at liberty to renew the motion to dismiss.

RICHARD SANDIFORD, Appellant, *v.* THE TOWN OF HEMPSTEAD, Respondent, and CARMAN FROST et al., Appellants.

Sandiford v. Town of Hempstead, 97 App. Div. 168, affirmed.

(Argued October 5, 1906; decided October 26, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 10, 1904, affirming a judgment in favor of defendant Town of Hempstead entered upon the report of a referee in an

action to establish the title of the appellants herein to certain premises and to land under water of Hempstead bay.

Richard Sandiford, in person, *W. Martin Jones, Jr.*, and *Charles L. Vandewater* for appellants.

Edward E. Sprague and *Fred Ingraham* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

THE COUNTY OF JEFFERSON, Appellant, v. THE COUNTY OF
OSWEGO, Respondent.

County of Jefferson v. County of Oswego, 102 App. Div. 232, affirmed.
(Argued October 10, 1906; decided October 26, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 10, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to recover a sum paid by the plaintiff for the support at the Matteawan State Hospital of an insane person who was a resident of Oswego county but under indictment in Jefferson county, his trial having been suspended on account of insanity.

E. C. Emerson for appellant.

Merrick Stowell for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

PETER E. SWENSON, Respondent, v. THE WILSON & BAILLIE
MANUFACTURING COMPANY, Appellant.

Swenson v. Wilson & Baillie Mfg. Co., 102 App. Div. 477, affirmed.
(Argued October 10, 1906; decided October 26, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

March 24, 1905, sustaining plaintiff's exceptions to a dismissal of the complaint by the court at a Trial Term, which exceptions were ordered to be heard in the first instance by the Appellate Division, and granting a motion for a new trial in an action to recover for personal injuries alleged to have been received by the plaintiff through the negligence of his employer, the defendant.

Frank Verner Johnson for appellant.

Conrad Saxe Keyes for respondent.

Order affirmed and judgment absolute ordered against the appellant on the stipulation, with costs in all courts; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ. Absent: GRAY, J.

HELEN M. HOWELL, Respondent, v. THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY OF BOSTON, Appellant.

Howell v. Hancock Mut. L. Ins. Co., 107 App. Div. 200, affirmed.
(Argued October 10, 1906; decided October 26, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 21, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on a policy of life insurance.

William De Graff for appellant.

Elbridge L. Adams for respondent.

Judgment affirmed, with costs, on the ground that no sufficient exception was taken to the submission to the jury of the question as to whether the time in which to pay the premium had been extended; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

**CHARLES NEUBRECH, Respondent, v. WILLIAM V. LAWRENCE,
Appellant, Impleaded with Another.**

Neubrech v. Lawrence, 101 App. Div. 609, affirmed.
(Argued October 10, 1906; decided October 26, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 10, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for the foreclosure of a mechanic's lien.

Joseph S. Wood for appellant.

Andrew F. Van Thun, Jr., for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., VANN, HISCOCK and CHASE, JJ.
Dissenting: EDWARD T. BARTLETT and HAIGHT, JJ. Absent: GRAY, J.

**HENRY KREMER, Respondent, v. NEW YORK EDISON COMPANY,
Appellant.**

Kremer v. New York Edison Co., 103 App. Div. 433, affirmed.
(Argued October 11, 1906; decided October 26, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 27, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through the negligence of defendant.

H. Snowden Marshall and *Frederick E. Fishel* for appellant.

Stephen C. Baldwin for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ. Absent: GRAY, J.

ELIZA WAITE, Appellant, *v.* LOUIS C. GREENLEAF et al.,
Respondents.

Waite v. Greenleaf, 96 App. Div. 639, affirmed.
(Argued October 12, 1906; decided October 26, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 15, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover damages for alleged fraudulent representations through which defendants acquired title to certain real estate belonging to plaintiff.

John Conboy for appellant.

Joseph Atwell for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

THE UNITED STATES LEATHER COMPANY, Respondent, *v.*
NEWTON ALDRICH et al., Appellants.

United States Leather Co. v. Aldrich, 75 App. Div. 616, affirmed.
(Argued October 12, 1906; decided October 26, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered October 3, 1902, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover damages occasioned to plaintiff through the creation by defendant of an artificial flood and the floating of logs thereby against plaintiff's dam.

Vasco P. Abbott for appellants.

Earl Bancroft for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and HISCOCK, JJ. Absent: GRAY, J. Not sitting: CHASE, J.

**THE NEW YORK BRICK AND PAVING COMPANY, Appellant, v.
BRONX BOROUGH BANK OF NEW YORK, Respondent.**

New York Brick & Paving Co. v. Bronx Borough Bank of New York, 105 App. Div. 628, affirmed.

(Argued October 12, 1906; decided October 26, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 12, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action to recover for the alleged conversion of certain checks.

Louis L. Waters for appellant.

Henry C. Henderson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

**FRANCIS P. MARTIN, Respondent, v. AMBROSE A. GAVIGAN
COMPANY et al., Appellants.**

Reported below, 107 App. Div. 279.

(Argued October 19, 1908; decided October 26, 1896.)

MOTION upon argument for leave to withdraw appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 2, 1905, reversing a judgment in favor of defendants entered upon the report of a referee, and granting a new trial in an action for the foreclosure of a mechanic's lien.

The motion was made upon the ground that it did not appear from the order of the Appellate Division that the reversal was upon questions of law only.

Augustin Ledwith and *William J. Swalm* for appellants.

Hector M. Hitchings for respondent.

The interests of justice require the granting of this motion, but upon conditions that will not cast the burden thereof entirely upon the respondent. The motion is granted upon the conditions that within twenty days from the date of the entry and service of this order, the appellants pay to the respondent's attorney all the costs of this appeal in this court, including fee for argument, and a counsel fee of fifty dollars. If such payment be not made within the time specified, then the motion is denied and the order is affirmed and judgment absolute ordered against appellants on the stipulation, with costs in all courts.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

THE PEOPLE OF THE STATE OF NEW YORK Respondent, *v.*
SAMUEL JAFFE, Appellant.

(Submitted October 22, 1906; decided October 26, 1906.)

Motion for re-argument denied. (See 185 N. Y. 497.)

MAX GLUCKMAN et al., Respondents, *v.* SIMON STRAUCH et al.,
Appellants.

Gluckman v. Strauch, 99 App. Div. 361, affirmed.

(Argued October 15, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1904, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term, and granting a new trial in an action to restrain the alleged infringement of a trade mark.

S. K. Lichenstein and *W. F. Ashley, Jr.*, for appellants.

John Ewen and *Frederick E. Anderson* for respondents.

Order affirmed and judgment absolute ordered against appellants on the stipulation, with costs in all courts; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

CLARA E. FROMER, Respondent, *v.* SIMON OTTENBERG et al.,
Appellants.

Fromer v. Ottenberg, 105 App. Div. 640, affirmed.
(Argued October 15, 1906; decided November 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 21, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to restrain the alleged infringement of a certain trade mark or brand for cigars.

John J. Crawford and *Charles H. Brush* for appellants.

S. K. Lichenstein for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER,
WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

CHARLES PLUCKHAM, Respondent, *v.* AMERICAN BRIDGE
COMPANY, Appellant.

Pluckham v. American Bridge Co., 104 App. Div. 404, affirmed.
(Argued October 15, 1906; decided November 18, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 18, 1905, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial and granted a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

Frank Verner Johnson for appellant.

Charles Caldwell for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER,
WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

JOHN WANAMAKER, Respondent, v. THOMAS J. POWERS, JR.,
Appellant.

Wanamaker v. Powers, 102 App. Div. 485, affirmed.
(Submitted October 15, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 16, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover on a contract of guaranty.

Nathan P. Bushnell for appellant.

Gerard Roberts for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER and HISCOCK, JJ. Absent: GRAY, J. Not sitting: WILLARD BARTLETT, J.

JACOB SERVISS, Respondent, v. INTERNATIONAL PAPER COM-
PANY, Appellant.

Serviss v. International Paper Co., 105 App. Div. 626, affirmed.
(Argued October 16, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 26, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

Henry Purcell for appellant.

Arthur L. Chapman and *Louis B. Dewey* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: GRAY, J.

HERZOG TELESEME COMPANY, Respondent, v. MAJESTIC HOTEL COMPANY, Appellant.

Herzog Teleseme Company v. Majestic Hotel Co., 105 App. Div. 642, affirmed.

(Argued October 16, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 28, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on an alleged contract.

John J. Crawford and *Charles H. Brush* for appellant.

Henry B. Corey for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

ST. REGIS PAPER COMPANY, Appellant, v. TONAWANDA BOARD AND PAPER COMPANY, Respondent.

St. Regis Paper Co. v. Tonawanda Board & Paper Co., 107 App. Div. 90, affirmed.

(Argued October 16, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 22, 1905, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial, and granted a new trial in an action to recover a sum alleged to be due for goods sold and delivered.

Henry Purcell for appellant.

Lewis T. Payne for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

CALVIN MENGLE, Respondent, v. McCLINTIC-MARSHALL
CONSTRUCTION COMPANY, Appellant.

Mengle v. McClintic-Marshall Constr. Co., 107 App. Div. 624, affirmed.
(Argued October 16, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 31, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant.

Frank Verner Johnson for appellant.

Vincent P. Donihoe and *Edward S. Hatch* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WILLARD BARTLETT and HISCOCK, JJ. Dissenting: WERNER, J. Absent: GRAY, J.

HARRIET C. WILLARD, Respondent, v. SARAH A. WELCH
et al., Appellants, Impleaded with Others.

Willard v. Welch, 94 App. Div. 179, affirmed.
(Argued October 17, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 2, 1904, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action for the foreclosure of a mortgage.

C. J. Palmer and *Richard Hurley* for appellants.

A. M. Mills for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J. Absent: GRAY, J.

**HANS TRIEST et al., Respondents, v. GEORGE VASSAR, JR.,
et al., Appellants.**

Triest v. Vassar, 107 App. Div. 624, affirmed.
(Argued October 17, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 6, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover for an alleged breach of contract.

Theodore Hansen for appellants.

Arthur A. Mitchell and *Joseph J. Baker* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER,
WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

**JOSEPH BIER et al., Respondents, v. WINFIELD S. BASH,
Appellant.**

Bier v. Bash, 107 App. Div. 429, affirmed.
(Submitted October 17, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 10, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover for breach of contract.

James A. Deering and *Clarence L. Barber* for appellant.

Jacob B. Engel for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD
BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

**H. T. JULIUS FUEHRMAN, Respondent, v. WILLIAM H. McCORD
et al., Appellants.**

Fuehrman v. McCord, 107 App. Div. 12, affirmed.
(Argued October 17, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 9, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, without a jury, in an action to recover an installment alleged to be due pursuant to a written agreement.

James F. McNaboe and *Nathaniel S. Smith* for appellants.

William H. L. Edwards and *Winthrop E. Dwight* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

**CHARLES ALT et al., Respondents, v. CLAUS DOSCHER,
Appellant.**

Alt v. Doscher, 102 App. Div. 344, affirmed.
(Argued October 17, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 3, 1905, affirming a judgment of the Municipal Court of the city of New York in favor of plaintiffs in an action to recover commissions alleged to have been earned in effecting a sale of real property.

Henry F. Cochrane for appellant.

George C. Buechner for respondents.

Judgment affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER and HISCOCK, JJ. Absent: GRAY, J. Not sitting: WILLARD BARTLETT, J.

**FREDERICK W. KUEHN, Respondent, v. SYRACUSE RAPID
TRANSIT RAILWAY COMPANY, Appellant.**

Kuehn v. Syracuse Rapid Transit Ry. Co., 104 App. Div. 580, affirmed.
(Argued October 18, 1906; decided November 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 9, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

C. E. Spencer for appellant.

Frank C. Sargent for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

**WILLIAM ROCKEFELLER, Respondent, v. OLIVER LAMORA,
Appellant.**

Rockefeller v. Lamora, 106 App. Div. 845, affirmed.
(Argued October 18, 1906; decided November 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 5, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover a penalty under the provisions of the Forest, Fish and Game Law because of defendant's trespassing upon and taking fish from a stream where it flowed across plaintiff's private park.

J. Newton Fiero for appellant.

John P. Kellas for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

SAMUEL K. NESTER, Appellant, v. HENRY COLTER, Respondent.

Nester v. Colter, 98 App. Div. 684, affirmed.

(Argued October 18, 1906; decided November 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 17, 1905, affirming a judgment in favor of defendant entered upon the report of a referee in an action to rescind a contract on the ground of alleged false representations.

William S. Moore for appellant.

Lyman J. Baskin for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

HENRIETTA DRESSNER, Respondent, v. HENRY T. DRESSNER, Appellant.

Dressner v. Dressner, 104 App. Div. 617, affirmed.

(Submitted October 19, 1906; decided November 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 6, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover money due under an alleged written contract.

Max D. Steuer for appellant.

Benjamin F. Feiner for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER and HISCOCK, JJ. Absent: GRAY, J. Not sitting: WILLARD BARTLETT, J.

CLARENCE T. COLEY et al., Respondents, v. CORNELIUS H. TALLMAN, Individually and as Executor of and Trustee under the Will of JACOB B. TALLMAN; Deceased, et al., Appellants, Impleaded with Others.

Coley v. Tallman, 107 App. Div. 445, affirmed.
(Argued October 22, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 23, 1905, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to set aside a certain deed as fraudulent

Flamen B. Candler and Robert W. Candler for appellants.

Eugene Lamb Richards, Jr., for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ. Absent: GRAY, J.

CHARLES BAYER et al., Appellants, v. FRANK LUGAR, Respondent.

Bayer v. Lugar, 106 App. Div. 522, affirmed.
(Argued October 22, 1906; decided November 13, 1906.)

APPEAL from a judgment entered July 22, 1905, upon an order of the Appellate Division of the Supreme Court in the first judicial department; which overruled plaintiffs' exceptions, ordered to be heard in the first instance by the Appellate Division, denied a motion for a new trial and directed a dismissal of the complaint in an action to recover a sum alleged to be due upon a contract of guaranty.

Joab H. Banton for appellants.

Samuel F. Jacobs and Abraham L. Jacobs for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER and WILLARD BARTLETT, JJ. Dissenting: HISCOCK and CHASE, JJ. Absent: GRAY, J.

**THE ARLINGTON COMPANY, Respondent, v. COLONIAL ASSUR-
ANCE COMPANY OF THE CITY OF NEW YORK, Appellant.**

Arlington Co. v. Colonial Assur. Co., 109 App. Div. 908, affirmed.
(Argued October 22, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 5, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover upon a policy of fire insurance.

Arnold L. Davis and *William B. Ellison* for appellant.

George Richards for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ. Absent: GRAY, J.

**FRANKLIN B. CASE, JR., Appellant, v. THE NEW YORK
MUTUAL SAVINGS AND LOAN ASSOCIATION et al., Respond-
ents, Impleaded with Others.**

Case v. N. Y. Mutual S. & L. Assn., 99 App. Div. 624, affirmed.
(Argued October 22, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 9, 1905, affirming a judgment in favor of defendants entered upon an order of the Appellate Division which reversed an interlocutory judgment overruling demurrers to the complaint and sustained such demurrers in a stockholder's action for the appointment of a receiver of a certain corporation, and for an accounting and payment to such receiver of moneys due said corporation from the defendants.

Hector M. Hitchings for appellant.

Frank E. Smith for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ. Absent: GRAY, J.

MARY W. JENNINGS, Respondent, *v.* SUPREME COUNCIL OF THE LOYAL ADDITIONAL BENEFIT ASSOCIATION, Appellant.

Jennings v. Supreme Council L. A. B. Assn., 108 App. Div. 366, affirmed. (Argued October 22, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 16, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover the amount of an insurance benefit certificate.

Uriah W. Tompkins for appellant.

Charles M. Demond and *Walter S. Logan* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ. Absent: GRAY, J.

JOHN TURCK, Respondent, *v.* RACHAEL ROBINSON, Appellant.

Turck v. Robinson, 105 App. Div. 627, affirmed. (Submitted October 23, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 6, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

The interests of justice require the granting of this motion, but upon conditions that will not cast the burden thereof entirely upon the respondent. The motion is granted upon the conditions that within twenty days from the date of the entry and service of this order, the appellants pay to the respondent's attorney all the costs of this appeal in this court, including fee for argument, and a counsel fee of fifty dollars. If such payment be not made within the time specified, then the motion is denied and the order is affirmed and judgment absolute ordered against appellants on the stipulation, with costs in all courts.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

THE PEOPLE OF THE STATE OF NEW YORK Respondent, *v.*
SAMUEL JAFFE, Appellant.

(Submitted October 22, 1906; decided October 26, 1906.)

Motion for re-argument denied. (See 185 N. Y. 497.)

MAX GLUCKMAN et al., Respondents, *v.* SIMON STRAUCH et al.,
Appellants.

Gluckman v. Strauch, 99 App. Div. 361, affirmed.

(Argued October 15, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1904, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term, and granting a new trial in an action to restrain the alleged infringement of a trade mark.

S. K. Lichenstein and *W. F. Ashley, Jr.*, for appellants.

John Ewen and *Frederick E. Anderson* for respondents.

Order affirmed and judgment absolute ordered against appellants on the stipulation, with costs in all courts; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

CLARA E. FROMER, Respondent, v. SIMON OTTENBERG et al.,
Appellants.

Fromer v. Ottenberg, 105 App. Div. 640, affirmed.

(Argued October 15, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 21, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to restrain the alleged infringement of a certain trade mark or brand for cigars.

John J. Crawford and *Charles H. Brush* for appellants.

S. K. Lichenstein for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER,
WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

CHARLES PLUCKHAM, Respondent, v. AMERICAN BRIDGE
COMPANY, Appellant.

Pluckham v. American Bridge Co., 104 App. Div. 404, affirmed.

(Argued October 15, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 18, 1905, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial and granted a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

Frank Verner Johnson for appellant.

Charles Caldwell for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER,
WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

JOHN WANAMAKER, Respondent, v. THOMAS J. POWERS, JR.,
Appellant.

Wanamaker v. Powers, 102 App. Div. 485, affirmed.

(Submitted October 15, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 16, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover on a contract of guaranty.

Nathan P. Bushnell for appellant.

Gerard Roberts for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER and HISCOCK, JJ. Absent: GRAY, J. Not sitting: WILLARD BARTLETT, J.

JACOB SERVISS, Respondent, v. INTERNATIONAL PAPER COMPANY, Appellant.

Serviss v. International Paper Co., 105 App. Div. 626, affirmed.

(Argued October 16, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 26, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

Henry Purcell for appellant.

Arthur L. Chapman and *Louis B. Dewey* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: GRAY, J.

HERZOG TELESEME COMPANY, Respondent, v. MAJESTIC HOTEL COMPANY, Appellant.

Herzog Teleseme Company v. Majestic Hotel Co., 105 App. Div. 642, affirmed.

(Argued October 16, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 28, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on an alleged contract.

John J. Crawford and *Charles H. Brush* for appellant.

Henry B. Corey for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

ST. REGIS PAPER COMPANY, Appellant, v. TONAWANDA BOARD AND PAPER COMPANY, Respondent.

St. Regis Paper Co. v. Tonawanda Board & Paper Co., 107 App. Div. 90, affirmed.

(Argued October 16, 1906; decided November 13, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 22, 1905, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial, and granted a new trial in an action to recover a sum alleged to be due for goods sold and delivered.

Henry Purcell for appellant.

Lewis T. Payne for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Absent: GRAY, J. Not sitting: HISCOCK, J.

CALVIN MENGLE, Respondent, *v.* MCCLINTIC-MARSHALL
CONSTRUCTION COMPANY, Appellant.

Mengle v. McClintic-Marshall Constr. Co., 107 App. Div. 624, affirmed.
(Argued October 16, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 31, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant.

Frank Verner Johnson for appellant.

Vincent P. Donihoe and *Edward S. Hatch* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WILLARD BART-
LEFT and HISCOCK, JJ. Dissenting: WERNER, J. Absent:
GRAY, J.

HARRIET C. WILLARD, Respondent, *v.* SARAH A. WELCH
et al., Appellants, Impleaded with Others.

Willard v. Welch, 94 App. Div. 179, affirmed.
(Argued October 17, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 2, 1904, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action for the foreclosure of a mortgage.

C. J. Palmer and *Richard Hurley* for appellants.

A. M. Mills for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER and
WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J. Absent:
GRAY, J.

**HANS TRIEST et al., Respondents, v. GEORGE VASSAR, JR.,
et al., Appellants.**

Triest v. Vassar, 107 App. Div. 624, affirmed.
(Argued October 17, 1906; decided November 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 6, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover for an alleged breach of contract.

Theodore Hansen for appellants.

Arthur A. Mitchell and *Joseph J. Baker* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER,
WILLARD BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

**JOSEPH BIER et al., Respondents, v. WINFIELD S. BASH,
Appellant.**

Bier v. Bash, 107 App. Div. 429, affirmed.
(Submitted October 17, 1906; decided November 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 10, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover for breach of contract.

James A. Deering and *Clarence L. Barber* for appellant.

Jacob B. Engel for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD
BARTLETT and HISCOCK, JJ. Absent: GRAY, J.

CORNELIUS CALLAHAN, Appellant, v. EMILY GODWIN, as Administratrix of the Estate of THOMAS W. WEATHERED, Deceased, Respondent.

Callahan v. Godwin, 110 App. Div. 889, affirmed.

(Submitted October 26, 1906; decided November 13, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 20, 1905, affirming a judgment in favor of defendant entered upon the report of a referee in an action to recover a sum alleged to be due for work performed and materials furnished.

Benjamin F. Carpenter for appellant.

Hector M. Hitchings for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ. Absent: GRAY, J.

ST. REGIS PAPER COMPANY, Appellant, v. THE SANTA CLARA LUMBER COMPANY, Respondent, Impleaded with Another.

(Submitted October 22, 1906; decided November 13, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 186 N. Y. 89.)

WILLIAM DOUGHERTY, Respondent, v. MICHAEL K. NEVILLE, Appellant.

Dougherty v. Neville, 108 App. Div. 89, affirmed.

(Argued October 26, 1906; decided November 20, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered October 28, 1905, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a

new trial in an action to rescind a contract on the ground of false representations.

George W. Steadman, James J. Macklin and La Roy S. Gove for appellant.

Walter N. Gill and Howard Chipp for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Not sitting: CHASE, J. Absent: GRAY, J.

ARTHUR F. SIMONSON, Respondent, *v.* LOUIS P. MENDHAM
et al., Appellants.

Reported below, 115 App. Div. 882.

(Submitted November 12, 1906; decided November 20, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 3, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the ground that the appeal was irregular and unauthorized.

Albert A. Wray and Stephen Callaghan for motion.

Frank A. Acer opposed.

Motion denied, with ten dollars costs.

RINEHART KUELLING, Respondent, *v.* THE RODERICK LEAN
MANUFACTURING COMPANY, Appellant.

Reported below, 118 App. Div. 891.

(Argued November 12, 1906; decided November 20, 1906.)

MOTION to dismiss an appeal from a judgment entered June 2, 1906, upon an order of the Appellate Division of the

Supreme Court in the fourth judicial department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial, and directing judgment for the plaintiff upon the verdict.

The motion was made upon the ground that the record presented no questions of law for review.

Charles Van Voorhis for motion.

S. D. Bentley opposed.

Motion denied.

In the Matter of the Probate of the Will of ROBERT E. HOPKINS, Deceased.

ROBERT E. HOPKINS, JR., Appellant; FANNY W. HOPKINS et al., Respondents.

(Submitted November 12, 1906; decided November 20, 1906.)

MOTION for re-argument. (See 185 N. Y. 542.)

Motion denied. The appeal was properly dismissed. It was taken from an order affirming an order denying a motion for a new trial. There is no authority for such an appeal to this court. Both the Constitution and section 190 of the Code of Civil Procedure, passed in pursuance of it, authorize appeals to this court only from final judgments or from orders granting a new trial where a stipulation for judgment absolute is given by the appellants, not from orders denying a motion for a new trial. In the latter case the appeal must be taken from the judgment and on such an appeal only can we review the decision below.

ALBERT J. BARNES, Respondent, v. EUGENE B. HOWELL, 'as Receiver of THE LONG ISLAND REAL ESTATE EXCHANGE AND INVESTMENT COMPANY, Appellant, and THE PEOPLE'S TRUST COMPANY, Respondent.

(Submitted November 12, 1906; decided November 20, 1906.)

Motions for re-argument and to amend remittitur denied. (See 186 N. Y. 550.)

EASTHAMPTON LUMBER AND COAL COMPANY, LIMITED, Respondent,
v. LAURA T. WORTHINGTON, Appellant.

Easthampton L. & C. Co. v. Worthington, 108 App. Div. 355, reversed.
(Argued November 15, 1906; decided November 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 4, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for the foreclosure of a mechanic's lien.

John Burlinson Coleman for appellant.

Timothy M. Griffing for respondent.

VANN, J. This case was argued with that brought by the same plaintiff against another defendant and is infected with the same error. (*Easthampton Lumber & Coal Co. v. Worthington*, 186 N. Y. 407.) Both cases were tried at the same term and before the same judge, who found in each that the contract was substantially performed. The Appellate Division affirmed his judgment by a divided vote. The contract and the contractor were the same in both cases, except that there was a difference in the specifications and the price. The failures to comply with the specifications were of the same general nature and some of them were literally the same. The recovery was for the full amount claimed with no deduction for omissions.

The contractor testified: "One of the ash flues was left out. The lattice work in the kitchen was not done. The leaded glass and lattice work in the kitchen was not done as called for. The cement used was not Rosendale cement, it was Atlas cement. I did not furnish and set a rubbed blue stone hearth in the kitchen. I bridged all floor beams and all over 14 feet span, except the lower floor. I did not cover all first-story walls with 18-inch Washington red cedar shingles, laid with 5½ inches to the weather. They were not laid with 5½ inches to the weather. I did not use Washington red cedar shingles on the roof. I bought the glass for American double thick. I could not swear to it; I bought it for that. The doors

were to be $1\frac{1}{2}$ inches thick. There are five of these doors $1\frac{1}{2}$ inches thick. The partition for the china closet was set before the details came. It was to be set according to the floor plans. It was plastered right in the room. In that respect it is not like the details. The details and floor plans do not agree.

"The second floor was not floored with seven-eighths by two and one-half North Carolina pine. I did not furnish corner beads with turned tips. I did not use Sampson's Spot Braided sash cord. I used Silver Lake cord. I don't know whether the piping was covered with a coat of asbestos. The tin was old method tin; I don't know what kind. It was first quality tin. I can't swear positively that rain leaders were four inches in diameter.

"I did not use H. W. John's liquid paint on the outside of the house. I did not use H. W. John's paint for the porch floors. I forget just what was put on. I know it was oiled; I think it was oiled. I can't swear to it. It was oil or paint.

"The details—the plans—show 18-inch columns for the porch. I can't say whether they were. I can't testify to just the size of these. The details of the rafters show a curved end. They were not made that way. * * * I charge extra for locust posts in place of cedar, because they cost more. Locust or cedar posts were called for by the specifications. I took the most expensive because it was best for the owner. I figured for cedar; I could not put in locust if I made an estimate on cedar. * * * I changed the porch flooring, because it would make a better job. No one asked me to do that. Only because it would make a better job. They wanted a good job." Some of these omissions were sufficiently explained, others insufficiently and some not at all, but no allowance was made for any.

For the reasons set forth in our opinion in the other case, we reverse the judgment in this case also upon the ground that there was no evidence to support the finding that the contract was substantially performed.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, HAIGHT, WERNER and HISCOCK, JJ., concur; WILLARD BARTLETT, J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LOREN J. WALTERS, Appellant, v. EDSON LEWIS, as Police Commissioner of the City of Mount Vernon, Respondent.

People ex rel. Walters v. Lewis, 111 App. Div. 375, affirmed.
(Argued November 12, 1906; decided November 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 26, 1906, which affirmed the determination of the defendant in removing the relator from the police force of the city of Mount Vernon.

Sydney A. Syme for appellant.

David Swits for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, CH. J., O'BRIEN, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

ROBERT C. PRUYN, as a Stockholder of the Guayaquil and Quito Railway Company, Respondent, v. GUAYAQUIL AND QUITO RAILWAY COMPANY et al., Appellants.

Pruyn v. Guayaquil & Quito Ry. Co., 113 App. Div. 894, 895, affirmed.
(Argued November 12, 1906; decided November 27, 1906.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 3, 1906, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint in an action for the appointment of a receiver of the defendant railway company and for an accounting.

The following questions were certified:

"1. Does the complaint state facts sufficient to constitute a cause of action?

"2. Are causes of action improperly united as alleged in the defendant's demurrer?"

Alfred A. Wheat, Jordan J. Rollins, John T. Smith and Francis Dana for appellants.

Arthur L. Andrews for respondent.

Order affirmed, with costs; first question certified answered in the affirmative; second question in the negative; no opinion.

CONCURRENCE: CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Accounting of J. MONTGOMERY STRONG,
as Executor of ELIZABETH L. STRONG, Deceased, Appellant.

GEORGE M. WRIGHT, as Assignee of HILTON, HUGHES & Co.,
Respondent.

Matter of Strong, 111 App. Div. 281, affirmed.

(Argued November 12, 1906; decided November 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 23, 1906, which affirmed an order of the New York County Surrogate's Court adjudging the appellant herein in contempt for his failure to pay a certain sum to the respondent as directed by a decree judicially settling his accounts.

William R. Adams for appellant.

James S. Darcy for respondent.

Order affirmed, with costs; no opinion.

CONCURRENCE: CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

BREVOORT REAL ESTATE COMPANY, Plaintiff, v. JOHN KINGSTON
et al., Defendants.

HENRY NOBEL et al., Appellants; JOSEPH H. CLAFFY,
Respondent.

Brevoort Real Estate Co. v. Kingston, 114 App. Div. 904, affirmed.

(Argued November 12, 1906; decided November 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June

20, 1906, which affirmed an order of Special Term confirming the report of a referee in surplus money proceedings.

Charles H. Stoddard for appellants.

Frank M. Avery and *Henry W. Eaton* for respondent.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ:

In the Matter of the Accounting of JAMES HULL, as Executor of MARY E. HULL, Deceased, Appellant.

HELEN M. WILLIAMS, Respondent.

Matter of Hull, 112 App. Div. 906, affirmed.

(Argued November 13, 1906; decided November 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 13, 1906, which affirmed a decree of the Fulton County Surrogate's Court settling the accounts of James Hull, as executor of the estate of Mary E. Hull, deceased.

H. D. Wright for appellant.

Frank Talbot for respondent.

Order affirmed, with costs; no opinion.

CONCUR: HAIGHT, VANN, WERNER and HISCOCK, JJ.
Dissenting: CULLEN, Ch. J., and GRAY, J. Not sitting:
WILLARD BARTLETT, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK JUVENILE ASYLUM, Appellant, v. FRANK A. O'DONNELL et al., as Commissioners of Taxes and Assessments for the City of New York, Respondents.

People ex rel. N. Y. Juvenile Asylum v. O'Donnell, 114 App. Div. 902, affirmed.

(Argued November 12, 1906; decided November 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department entered June

15, 1906, which affirmed an order of Special Term dismissing a writ of certiorari and confirming an assessment for taxation.

Arthur F. Cosby for appellant.

William B. Ellison, Corporation Counsel (George S. Coleman and William H. King of counsel), for respondents.

Order affirmed, with costs; no opinion.

CONCUR: CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of WAGER J. HULL, Deceased.

IDA M. HULL, as Executrix, Appellant; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

Matter of Hull, 111 App. Div. 322, affirmed.

(Argued November 12, 1906; decided November 27, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 12, 1906, which reversed a decree of the Westchester County Surrogate's Court fixing a transfer tax on the estate of Wager J. Hull, deceased.

Albert Ritchie and Joseph W. Middlebrook for appellant.

Charles H. Lovett and Frank M. Buck, for respondent.

Order affirmed, with costs payable out of the estate; no opinion.

CONCUR: CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

ORREN B. JACOBS et al., Respondents, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Jacobs v. N. Y. C. & H. R. R. R. Co., 107 App. Div. 134, affirmed.

(Submitted November 13, 1906; decided November 27, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

July 15, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover damages for a loss by fire alleged to have been occasioned through defendant's negligence.

Henry Purcell for appellant.

Irving G. Hubbs for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: GRAY and HISCOCK, JJ.

In the Matter of the Application of GEORGE E. PAYNE et al.,
Appellants, for a Writ of Mandamus Against JOHN F.
O'BRIEN, as Secretary of State, Respondent.

(Submitted November 12, 1906; decided November 27, 1906.)

Motion for re-argument denied, without costs. (See 186 N. Y. 1.)

RICHARD SANDIFORD, Appellant, v. THE TOWN OF HEMPSTEAD,
Respondent, and CARMAN FROST et al., Appellants.

(Submitted November 19, 1906; decided November 27, 1906.)

Motion for re-argument denied, with ten dollars costs,
(See 186 N. Y. 554.)

EDWARD S. PERCIVAL, Appellant, v. JULIA A. PERCIVAL,
Respondent.

Percival v. Percival, 106 App. Div. 111, affirmed.

(Argued November 13, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 22, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action for divorce.

John J. Crawford and *Sanford S. Gowdey* for appellant.

Charles Blandy for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Not voting: CULLEN, Ch. J.

JAMES V. LAWRENCE, Appellant, v. JOHN J. MCKELVEY
et al., Respondents.

Lawrence v. McKelvey, 106 App. Div. 612, affirmed.

(Argued November 14, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 30, 1905, modifying and affirming as modified a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for the alleged malicious prosecution of an involuntary bankruptcy proceeding.

Ralph Earl Prime, Jr., for appellant.

Edward M. Shepard, *Frederick W. Mattocks* and *Seth Sprague Terry* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and HISCOCK, JJ. Not sitting: WILLARD BARTLETT, J.

CLARENCE R. CONGER, Individually and as Trustee, et al.,
Respondents, v. HYMAN ENSLER, Appellant, Impleaded with
Others.

Conger v. Ensler, 110 App. Div. 889, affirmed.

(Argued November 14, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 17, 1906, modifying and affirming as modified a judg-

ment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to obtain possession and recover for the use and occupation of certain premises.

Joseph Kettretch for appellant.

Albert F. Hagar for respondents.

Judgment affirmed, without costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

MARGARET O'SHAUGHNESSY, Respondent, v. THE ÆTNA
LIFE INSURANCE COMPANY, Appellant.

O'Shaughnessy v. Ætna Life Ins. Co., 105 App. Div. 625, affirmed.

(Argued November 14, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 15, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on a policy of accident insurance.

Maurice C. Spratt for appellant.

John D. Lynn for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

MARTHA J. FLAGLER et al., Appellants, v. ELIZABETH DEVLIN
et al., Respondents.

Flagler v. Devlin, 109 App. Div. 904, affirmed.

(Argued November 14, 1906; decided December 4, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 22, 1905, which reversed a judgment in favor of plaintiffs entered upon a verdict directed by the court and an

order denying a motion for a new trial and granted a new trial in an action to recover an undivided part of certain real property.

David Millar for appellants.

A. K. Potter for respondents.

Order affirmed and judgment absolute ordered against appellants on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

FRANKLIN H. SMITH, Respondent, v. JOSEPH HIRSCH et al.,
Appellants.

Smith v. Hirsch, 103 App. Div. 609, affirmed.

(Argued November 15, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 14, 1905, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover rent alleged to be due for the use and occupation of certain premises.

Nathan Ottinger for appellants.

Joseph M. Williams for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

JAMES B. ANGLIM, Appellant, v. AMERICAN CONSTRUCTION AND
TRADING COMPANY, Respondent.

Anglin v. American Constr. & Tr. Co., 109 App. Div. 237, affirmed.

(Argued November 16, 1906; decided December 4, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 15, 1905, which reversed a judgment in favor of

plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

J. N. Hammond for appellant.

William A. Sutherland for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

CLARENCE T. BIRKETT, Respondent, *v.* THE POSTAL TELEGRAPH-CABLE COMPANY, Appellant.

Birkett v. Postal Telegraph-Cable Co., 107 App. Div. 115, affirmed.
(Argued November 16, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 28, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover the amount of alleged overcharges collected from the plaintiff by an agent of defendant and applied by said agent to his own use.

J. N. Hammond for appellant.

Calvin J. Huson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

HORACE P. STARKWEATHER, Respondent, *v.* CHARLES SUNDTROM et al., Appellants.

Starkweather v. Sundstrom, 108 App. Div. 356, affirmed,
(Argued November 16, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 28, 1905, affirming a judgment in favor of plain-

tiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

Abram F. Servin and *Thomas Watts* for appellants.

A. D. Wales for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Not voting: VANN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
JACOB MANNASOVITCH, Appellant.

People v. Minnasovitch, 115 App. Div. 892, affirmed.
(Argued November 19, 1906; decided December 4, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 19, 1906, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of attempt at rape in the second degree.

Charles Goldzier for appellant.

William Travers Jerome, District Attorney (*E. Crosby Kindeberger* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN and WERNER, JJ. Dissenting: WILLARD BARTLETT and HISCOCK, JJ.

BELDEN ROACH, Appellant, *v.* THE CITY OF NEW YORK,
Respondent.

Roach v. City of New York, 105 App. Div. 642, affirmed.
(Argued November 19, 1906; decided December 4, 1906.)

APPEAL from a judgment entered July 24, 1905, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed an interlocutory

judgment of Special Term sustaining a demurrer to the complaint in an action to recover money alleged to have been involuntarily paid for void and illegal taxes.

Alfred A. Wheat and *Francis Dana* for appellant.

William B. Ellison, Corporation Counsel (*George S. Coleman* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

LIZZIE M. PALMER et al., Respondents, *v.* HICKORY GROVE CEMETERY, Appellant, Impleaded with Another.

Palmer v. Hickory Grove Cemetery, 106 App. Div. 613, affirmed.
(Argued November 20, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 10, 1905, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to restrain the defendant from acquiring certain lands for cemetery purposes.

Charles A. Wendell and *Alfred W. Kiddle* for appellant.

J. Addison Young, *Charles H. Young* and *Wilson Brown, Jr.*, for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and HISCOCK, JJ. Not sitting: WILLARD BARTLETT, J.

HARRY S. BOISNOT, Respondent, *v.* WILLIAM WILSON, Appellant.

Boisnot v. Wilson, 102 App. Div. 569, modified.
(Argued November 20, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered Janu-

ary 8, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon the report of a referee in an action to recover a balance alleged to be due for services under a contract of employment.

Walter D. Clark and *R. Floyd Clarke* for appellant.

Duncan A. MacIntyre and *William B. Ellison* for respondent.

Judgment entered on report of referee modified in accordance with opinion of PATTERSON, J., below, and as modified affirmed upon said opinion, without costs.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

ELIZA A. KEEFE, as Administratrix of the Estate of WILLIAM J. KEEFE, Deceased, Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Keeffe v. N. Y. C. & H. R. R. R. Co., 109 App. Div. 180, affirmed.
(Argued November 20, 1906; decided December 4, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 22, 1905, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused through defendant's negligence.

J. W. Shea for appellant.

Henry Purcell for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, WERNER and WILLARD BARTLETT, JJ. Not voting: VANN, J. Not sitting: GRAY and HISCOCK, JJ.

DOROTHY L. ROGERS, an Infant, by JOHN B. ROGERS, Her Guardian ad Litem, Appellant, *v.* THE CITY OF BINGHAMTON, Respondent.

Rogers v. City of Binghamton, 101 App. Div. 352, affirmed.
(Argued November 20, 1906; decided December 4, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 12, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through the failure of the defendant to prevent the riding of bicycles on the sidewalks of its streets.

Thomas J. Keenan for appellant.

Burr W. Mosher for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

HELEN M. HOWELL, Respondent, *v.* THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY OF BOSTON, Appellant.

(Submitted November 26, 1906; decided December 4, 1906.)

Motion for re-argument denied, with ten dollars costs. (See 186 N. Y. 556.)

HERMAN REINHEIMER, Respondent, *v.* THOMAS CUNNINGHAM et al., Appellants.

Reinheimer v. Cunningham, 113 App. Div. 921, appeal dismissed.
(Submitted November 26, 1906; decided December 4, 1906.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judi-

cial department, entered June 27, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the grounds that the judgment was not appealable as of right and permission to appeal had not been granted.

William D. Sporborg for motion.

Daniel Daly opposed.

Motion granted and appeal dismissed, with costs, and ten dollars costs of motion.

FRANK A. WEDDIGAN et al., Respondents, v. WILLIAM F. WHITING, Appellant.

Weddigan v. Whiting, 111 App. Div. 907, modified.

(Argued November 19, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 4, 1906, affirming a judgment in favor of plaintiffs entered upon the report of a referee in an action to restrain defendant from maintaining a certain dam at a height sufficient to set water back upon plaintiffs' lands, and for damages.

John D. Teller for appellant.

E. C. Aiken for respondents.

Judgment of the Special Term modified by adding these words to the last paragraph but one thereof: "But nothing herein contained shall be construed so as to require the defendant to reduce the height of his dam more than eight (8) inches," and the judgment as thus modified is affirmed, without costs to either party; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

SARAH M. TITTLE, Respondent, v. ALIDA M. VAN VALKENBURG et al., as Administrators of the Estate of CHARLES A. VAN VALKENBURG, Deceased, et al., Appellants.

Tittle v. Van Valkenburg, 75 App. Div. 69, affirmed.
(Argued November 19, 1906; decided December 11, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 17, 1904, which reversed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term, and granted a new trial in an action to compel defendants to execute a deed of certain premises pursuant to the terms of an alleged contract.

Charles J. Palmer for appellants.

Myron G. Bronner for respondent.

Order affirmed and judgment absolute ordered against appellants on the stipulation, without costs in any court; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

HUDSON RIVER WATER POWER COMPANY, Appellant, v. GLENS FALLS PORTLAND CEMENT COMPANY et al., Respondents.

Hudson River Water Power Co. v. Glens Falls P. Cement Co., 109 App. Div. 919, affirmed.
(Argued November 21, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 27, 1905, modifying and affirming as modified a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to recover for breach of contract.

Richard L. Hand, Edgar T. Brackett and Henry W. Williams for appellant.

Howard Taylor, William B. Anderson, Francis H. Kinnicutt and Louis M. Brown for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Not voting: CULLEN, Ch. J.

JOHN C. CALHOUN, Respondent, *v.* SAMUEL H. BUCK, Appellant.

Calhoun v. Buck, 108 App. Div. 866, affirmed.

(Argued November 22, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 17, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover one-half of the loss arising from a joint speculation in cotton entered into by the plaintiff and the defendant.

John R. Dos Passos and Don R. Almy for appellant.

Achilles H. Kohn and Henry Wollman for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

HUGH DOON, Respondent, *v.* AMERICAN SURETY COMPANY OF NEW YORK, Appellant.

Doon v. American Surety Co., 110 App. Div. 215, affirmed.

(Argued November 22, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered Janu-

ary 11, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action against a surety on an undertaking.

Henry W. Wiggins, Russell Wiggins and Henry C. Willcox for appellant.

Herbert A. Heyn for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

FREDERICK BRANDT, Appellant, *v.* THE CITY OF NEW YORK
et al., Respondents.

Brandt v. City of New York, 110 App. Div. 396, affirmed.
(Argued November 22, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 5, 1906, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action for the foreclosure of a mechanic's lien.

Gustav Lange, Jr., for appellant.

William F. Kimber for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

IDA C. PORTER, Appellant, *v.* THE PREFERRED ACCIDENT
INSURANCE COMPANY OF NEW YORK, Respondent.

Porter v. Preferred Accident Insurance Co., 109 App. Div. 108, affirmed.
(Argued November 23, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

November 21, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover on a policy of accident insurance.

Timothy Curtin for appellant.

S. M. Lindsley for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

LAZARUS LEVY, Respondent, v. SIMON POPPER, Appellant.

Levy v. Popper, 106 App. Div. 394, affirmed.

(Argued November 26, 1906; decided December 11, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 22, 1905, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial and granted a new trial in an action to recover a balance alleged to be due to plaintiff for certain stock purchased for defendant's account.

Charles F. Williams and *Eustace Conway* for appellant.

F. Spiegelberg for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts ; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J.

JOSEPHINE E. TWADDELL, Respondent, v. JOHN WEIDLER,
Appellant.

Twaddell v. Weidler, 109 App. Div. 444, affirmed.

(Argued November 26, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 27, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover possession of certain notes alleged to have been stolen.

A. T. Clearwater for appellant.

John G. Van Etten for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Not sitting: CHASE, J.
Absent: O'BRIEN, J.

JULIA A. CHAMBERLAIN et al., Respondents, v. THE HOME
INSURANCE COMPANY, Appellant.

Chamberlain v. Home Ins. Co., 108 App. Div. 356, affirmed.

(Argued November 26, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered October 28, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover upon a policy of fire insurance.

A. T. Clearwater for appellant.

James Jenkins, Charles Irwin and Roscoe Irwin for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Not sitting: CHASE, J.
Absent: O'BRIEN, J.

MARGARET S. THEALL, Appellant, v. THE VILLAGE OF PORT
CHESTER, Respondent.

Theall v. Village of Port Chester, 110 App. Div. 776, affirmed.
(Argued November 26, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 26, 1906, upon an order reversing a judgment in favor of plaintiff entered upon a dismissal of the complaint by the court on trial at Special Term and directing a dismissal of the complaint in an action to compel the specific performance of a contract to purchase certain lands.

Ralph E. Prime for appellant.

Jerome A. Peck for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J.

SAMUEL H. PIERIE, Appellant, v. HORACE W. SMITH et al.,
Respondents.

Pirie v. Smith, 109 App. Div. 911, affirmed.
(Argued November 26, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 27, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to recover for timber cut upon plaintiff's lands and to restrain future cutting.

L. H. Ford for appellant.

J. Frank La Rue and *Joseph Atwell* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
SAMUEL K. ELLENBOGEN, Appellant.

People v. Ellenbogen, 114 App. Div. 182, affirmed.

(Argued November 27, 1906; decided December 11, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 25, 1906, which affirmed a judgment rendered at a Trial Term upon a verdict convicting the defendant of feloniously making a false statement under oath in violation of section 7 of the Metropolitan Elections District Law.

George M. Curtis for appellant.

Julius M. Mayer, Attorney-General (*Lewis Ogden O'Brien* of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: CULLEN, Ch. J., HAIGHT, VANN and CHASE, JJ.

Dissenting: EDWARD T. BARTLETT and WILLARD BARTLETT, JJ. Absent: O'BRIEN, J.

FRANK W. MOLLOY, Respondent, v. THE CITY OF NEW
ROCHELLE, Appellant.

Molloy v. City of New Rochelle, 110 App. Div. 895, modified.

(Argued November 27, 1906; decided December 11, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 5, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for alleged extra work in the performance of a contract.

William D. Sawyer, Corporation Counsel (*Joseph T. Brown, Jr.*, of counsel), for appellant.

L. Lafflin Kellogg and *Alfred C. Petté* for respondent.

Judgment of Trial Term modified by deducting therefrom \$1,630.55, and reducing the extra allowance proportionately, and as modified affirmed, without costs in this court to either party; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Not sitting: WILLARD BARTLETT, J. Absent: O'BRIEN, J.

GEORGE O. LORD, Appellant, *v.* CITIZENS' STEAMBOAT COMPANY,
Respondent.

Reported below, 106 App. Div. 610.

(Submitted December 8, 1906; decided December 11, 1906.)

MOTION for leave to withdraw appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 9, 1905, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The motion was made upon the ground that the appeal had been inadvertently taken, the form of the order of reversal precluding the Court of Appeals from reviewing the questions of law involved.

Wray & Callaghan for motion.

Noble, Jackson & Hubbard opposed.

Motion granted on payment, within ten days, of taxable costs, including argument fee. Upon failure to comply with these conditions, motion denied, with ten dollars costs.

PERCY H. WILSON, Appellant, *v.* WILLIAM H. MANDEVILLE,
Respondent.

Wilson v. Manderville, 108 App. Div. 358, affirmed.

(Argued November 22, 1906; decided December 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 23, 1905, affirming a judgment in favor of defend-

ant entered upon a dismissal of the complaint by the court at a Trial Term in an action for libel.

Fred L. Eaton for appellant.

Allen J. Hastings for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

GRENVILLE A. SMITH, Appellant, v. JOHN E. MARSH et al.,
Respondents.

Smith v. Marsh, 111 App. Div. 918, affirmed.

(Argued November 28, 1906; decided December 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 29, 1906, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action of ejectment to recover an undivided share of certain lands.

Clarence L. Barber, Peter A. Hendrick and James A. Deering for appellant.

Theodore De Witt for respondents.

Judgment affirmed, with costs, on authority of *Van Winkle v. Van Winkle* (184 N. Y. 193).

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J

ANNA IRVING, Respondent, v. ELIZA BRUEN, Appellant.

Irving v. Bruen, 110 App. Div. 558, affirmed.

(Argued November 28, 1906; decided December 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered

January 20, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to set aside a certain deed and a will upon the ground of incompetency.

D. J. Sullivan for appellant.

Erskine C. Rogers for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WILLARD BARTLETT, JJ. Not sitting: CHASE, J. Absent: O'BRIEN, J.

MICHIGAN SAVINGS BANK, Respondent, *v.* GEORGE W. MILLAR et al., Appellants.

Michigan Savings Bank v. Millar, 110 App. Div. 670, affirmed.
(Argued November 28, 1906; decided December 18, 1906.)

APPEAL from a judgment, entered February 10, 1906, upon an order of the Appellate Division of the Supreme Court in the first judicial department, overruling defendants' exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for plaintiff upon the verdict in an action by an assignee to recover the price of goods alleged to have been sold and delivered.

T. M. Tyng and *Edward D. Dowling* for appellants.

Benjamin F. Blair for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J.

**MICHIGAN SAVINGS BANK, Respondent, v. COY, HUNT & Co.,
Appellant.**

Michigan Savings Bank v. Coy, Hunt & Co., 111 App. Div. 914, affirmed.
(Argued November 28, 1906; decided December 18, 1906.)

APPEAL from a judgment, entered February 10, 1906, upon an order of the Appellate Division of the Supreme Court in the first judicial department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for plaintiff upon the verdict in an action by an assignee to recover the price of goods alleged to have been sold and delivered.

T. M. Tyng and *Edward D. Dowling* for appellant.

Benjamin F. Blair for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J.

**MICHIGAN SAVINGS BANK, Respondent, v. CHARLES F. HUBBS,
Appellant.**

Michigan Savings Bank v. Hubbs, 111 App. Div. 915, affirmed.
(Argued November 28, 1906; decided December 18, 1906.)

APPEAL from a judgment, entered February 10, 1906, upon an order of the Appellate Division of the Supreme Court in the first judicial department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for plaintiff upon the verdict in an action by an assignee to recover the price of goods alleged to have been sold and delivered.

T. M. Tyng and Edward D. Dowling for appellant.

Benjamin F. Blair for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ. Absent: O'BRIEN, J.

ARTHUR C. JACOBSON et al., Comprising the Partnership of ARTHUR C. JACOBSON & SON, Appellants, v. HENRY S. STONE, Respondent.

Jacobson v. Stone, 110 App. Div. 919, affirmed.

(Submitted November 28, 1906; decided December 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 4, 1906, affirming a judgment in favor of defendant entered upon a verdict directed by the court in an action by materialmen to recover upon an order made by a contractor and accepted by the owner of a building in course of erection.

Hector M. Hitchings for appellants.

Thomas E. Pearsall for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. Not sitting: WILLARD BARTLETT, J. Absent: O'BRIEN, J.

BUFFALO LOAN, TRUST AND SAFE DEPOSIT COMPANY, Respondent and Appellant, v. JOHN CARSTENSEN, Appellant and Respondent.

Buffalo Loan, T. & S. D. Co. v. Carstensen, 107 App. Div. 128, affirmed. (Argued December 8, 1906; decided December 18, 1906.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department,

entered August 15, 1905, in favor of plaintiff upon the submission of a controversy under section 1279 of the Code of Civil Procedure as to the construction of a certain written agreement.

Tracy C. Becker and *Lincoln A. Groat* for plaintiff, respondent and appellant.

Wilson Lee Cannon and *Harry Bowers Mingle* for defendant, appellant and respondent.

Judgment affirmed, without costs to either party; no opinion.

CONCUR: EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ. CULLEN, Ch. J., O'BRIEN and WILLARD BARTLETT, JJ., vote for modification by reducing the recovery to \$6,300, with interest.

THOMAS A. DONOHUE, Respondent, *v.* AMERICAN BRIDGE COMPANY OF NEW YORK, Appellant.

Donohue v. American Bridge Co., 111 App. Div. 908, affirmed.
(Argued December 8, 1906; decided December 18, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 6, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

Charles E. Snyder for appellant.

William S. Jenney for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

In the Matter of the Accounting of MARTIN J. KEOGH,
as Trustee under the Will of DAVID JONES, Deceased,
Respondent.

ATALA W. THAYER et al., Appellants.

(Submitted December 10, 1906; decided December 18, 1906.)

Motion for re-argument denied, with ten dollars costs.
(See 186 N. Y. 544.)

HERBERT ROGERS, Appellant, v. THE CITY OF ROME,
Respondent.

Rogers v. City of Rome, 108 App. Div. 858, affirmed.

(Argued November 28, 1906; decided December 21, 1906.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 13, 1905, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial, and granted a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

Howard C. Wiggins for appellant.

M. J. Larkin for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

CONCUR: CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

FRANK BURGER, Appellant, v. THE SNARE AND TRIEST
COMPANY, Respondent.

Burger v. Snare & Triest Co., 105 App. Div. 636, affirmed.

(Argued December 8, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered

December 27, 1905, affirming a judgment in favor of defendant entered upon the report of a referee in an action to recover for personal injuries alleged to have been received through defendant's negligence.

J. Newton Fiero and Amasa J. Parker for appellant.

Hector M. Hitchings for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: GRAY, O'BRIEN, HAIGHT and VANN, JJ. Dissenting: CULLEN, Ch. J., EDWARD T. BARTLETT and WILLARD BARTLETT, JJ.

WILLIAM WALLACE GRANT, Respondent, *v.* PRATT & LAMBERT, Appellant.

Grant v. Pratt & Lambert, 110 App. Div. 867, affirmed.
(Argued December 4, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 20, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover upon a written contract.

John G. Milburn and George A. Miller for appellant.

Edward M. Shepard for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT and CHASE, JJ.; HAIGHT, J., dissents on the ground that the arbitration clause in the contract is valid and binding on the parties.

JOHN B. KEARNY, Respondent, *v.* METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, Appellant.

Kearny v. Metropolitan Trust Co., 110 App. Div. 236, affirmed.
(Argued December 5, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered Janu-

ary 15, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover an alleged balance of a deposit account.

Charles E. Rushmore for appellant.

Howard R. Bayne and *Walter L. McCorkle* for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

CHARLES R. ROSS, Respondent, v. BAYER-GARDNER-HIMES COMPANY, Appellant.

Ross v. Bayer-Gardner-Himes Co., 106 App. Div. 366, affirmed.
(Argued December 6, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 15, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover upon an agreement by a tenant to pay for certain work performed upon the premises, such payments, by consent of the owner, to be in lieu of rent.

George A. McLaughlin, *Charles B. Blair* and *Franklin D. Peale* for appellant.

John Aitken for respondent.

Andrew J. Skinner for Old Colony Realty Corporation, assignee.

Judgment affirmed, with costs ; no opinion.

CONCUR: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

EVA K. CONLON, Appellant, v. MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN et al., Respondents.

Conlon v. Mission of the Immaculate Virgin, etc., 104 App. Div. 690, affirmed.

(Argued December 6, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 18, 1905, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action for the specific performance of a contract alleged to have been made by a decedent as to the disposal of his estate.

Charles H. Blair for appellant.

B. P. Ryan, George S. Daniels, Lewis S. Goebel, Weeks W. Culver and *Charles W. Culver* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT and CHASE, JJ.

EASTMAN KODAK COMPANY, Respondent, v. JACOB KLEINHANS et al., Appellants.

Eastman Kodak Co. v. Kleinhans, 102 App. Div. 619, reversed.

(Argued December 12, 1906; decided December 21, 1906.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 16, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover money alleged to have been overpaid and for breach of contract.

Edmund Wetmore and *W. G. Havens* for appellants.

Walter S. Hubbell for respondent.

Judgment reversed and new trial granted, costs to abide event, unless within twenty days of the service of this order plaintiff stipulates to deduct from the recovery the sum of \$2,017.78,

with interest from September 27, 1899, to date of judgment, being the amount awarded for the excess of alcohol used, which award cannot be sustained under the complaint and findings, and in case of such stipulation being made, the judgment as reduced is affirmed, without costs in this court to either party; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN and CHASE, JJ.
Not sitting: WERNER and HISCOCK, JJ.

EDWARD T. BARTLETT, J. (dissenting). I vote for reversal. I am of opinion that whether this transaction be regarded as a sale of goods under an executory contract, or as a sale of a "homogeneous mixture," compounded by defendants for plaintiff, as found by the referee, there can be no recovery under well-settled principles of law. The mixture was inspected by plaintiff on receipt of every shipment of cans, as found by the referee, and paid for after such inspection. The fact that the manager of plaintiff testified that he directed the cashier not to pay the bills of defendants, but to make payments only on account; that the directions were not followed, is a mere self-serving declaration, which was no part of the *res gestæ*, and improperly admitted in evidence. The cashier was not sworn.

MARIA KEATING, as Administratrix of the Estate of JOHN KEATING, Deceased, Appellant, v. MANHATTAN RAILWAY COMPANY, Respondent.

Keating v. Manhattan Ry. Co., 110 App. Div. 108, appeal withdrawn. (Submitted December 17, 1906; decided December 21, 1906.)

MOTION for leave to withdraw an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 12, 1906, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial.

The motion was made upon the ground that the appeal was improvidently taken.

Reno R. Billington for motion.

Charles A. Gardiner opposed.

Motion granted, without costs.

INDEX.

ACCOUNTING.

See Myer v. Abbott (Mem.), 519; *Matter of Schroeder* (Mem.), 537; *Matter of Pitney* (Mem.), 540; *Matter of Keogh* (Mem.), 544; *Prugn v. G. & Q. Ry. Co.* (Mem.), 533; *Matter of Hull* (Mem.), 535.

ADOPTION.

Right of adopted child to inherit.

See REAL PROPERTY, 1-4.

APPEAL.

1. *Legislative Apportionment—Const. Art. 8, § 5.* The right of the Court of Appeals to review the action of the Supreme Court in cases relating to a legislative apportionment proceeds from its general appellate jurisdiction; in the absence of express legislative authority it cannot, in a proceeding attacking the validity of an apportionment, entertain an appeal from an order of the Appellate Division affirming an order of the Special Term denying an application for a common-law writ of mandamus, unless it affirmatively appears on the face of the order that it was not made in the exercise of discretion; and the jurisdiction of the court should not be strained when the effect of an adverse decision might be to throw a general election about to be held into inextricable confusion and chaos. *Matter of Sherill v. O'Brien.* 1

2. *Erroneous Reversal by Appellate Division of Judgment Directing Specific Performances—Code Civ. Pro. § 1338.* The question whether a party is entitled to the specific performance of an executory contract relating to personal property, or should be confined to an action at law to recover damages for a breach, rests in the sound discretion of the court; and upon an appeal from a judgment directing specific performance entered upon the report of a referee, although the Appellate Division in the exercise of its discretion may reverse upon the facts, where its order of reversal is silent as to the grounds thereof it must be assumed to have been based upon questions of law only; and if no error of law appears and there is evidence to sustain the findings of fact by the referee, the judgment must be affirmed. *Butler v. Wright.* 259

3. *Mandamus—Appellate Division—Erroneous Dismissal of Appeal From an Order Granting a Peremptory Writ of Mandamus.* It is erroneous for the Appellate Division to dismiss an appeal from a final order granting a writ of peremptory mandamus directing the defendants, as the board of elections of the city of New York, to perform certain acts, even though the defendants had obeyed the writ in part by performing some of the acts which they were commanded to perform, where the duty imposed upon them is continuous and will not be completed until election day; since a party affected by an order commanding him to do an act retains the right to appeal therefrom so long as the effect of the order may be to constrain his action in the future. *People ex rel. Quinn v. Voorhis.* 263

4. *Effect of Order of Appellate Division Reversing Judgment on Questions of Law Only.* Where the unanimous order of the Appellate Division, reversing a judgment rendered at Special Term on questions of law only, affirmatively declares that the facts have been examined and no error found therein, the facts found by the trial court are conclusive on the Court of Appeals and the only question that can be determined by the

APPEAL — Continued.

latter court is whether those facts justified or required a reversal of the judgment rendered thereon by the Special Term. *American Guild v. Damon*. 360

5. *When Order of Reversal Erroneously Grants New Trial Instead of Modifying Judgment.* Where a judgment in an action to foreclose a mortgage is properly reversed by the Appellate Division on the ground that the Special Term had erroneously awarded a recovery against the plaintiff for the excess of the sum due on a claim, set up by one of the defendants as a defense and set-off, over that due on the bond and mortgage, and it appears that it is not possible on another trial to vary the proof as to the liability of the plaintiff, a new trial should not be ordered, but the judgment merely modified, unless as a matter of law the claim of the defendant was not a valid set-off to the bond and mortgage. *Id.*

6. *Affirmance of Judgment by Appellate Division — When Court of Appeals May Reverse Order Affirming Judgment upon Exceptions to Refusal of Trial Court to Make Specific Findings of Fact.* Where the affirmance of a judgment of foreclosure by the Appellate Division is not unanimous, exceptions to refusals of the trial court to make certain findings of fact as requested by appellant may be considered by the Court of Appeals, and where the proposed findings are sustained by uncontradicted evidence, and the facts embodied therein are sufficient to relieve the appellant from liability, the judgment should be reversed and a new trial granted. *Arnot v. Union Salt Co.* 501

When erroneous taking of exhibits by jury does not warrant reversal of judgment of conviction.

See CRIMES, 4.

APPELLATE DIVISION.

Erroneous reversal by, of judgment directing specific performance.

See APPEAL, 2.

Erroneous dismissal by, of appeal from order granting peremptory writ of mandamus.

See APPEAL, 3.

Effect of order of, reversing judgment on questions of law only — erroneous grant of new trial.

See APPEAL, 4, 5.

ASSESSMENT.

1. *Utica (City of) — Assessment for Sewer — When Erroneous under Statutes Creating Board of Assessors in and for City of Utica.* Where a sewer which provides adequate drainage for the premises situated upon the west side of a street in the city of Utica was built many years ago and the entire cost thereof was assessed solely upon the property upon that side of the street because it conferred no benefit upon the premises on the east side of the street, which is considerably lower and cannot drain into such sewer, it is erroneous in making the assessment for a sewer subsequently built upon and for the benefit of the east side of the street to assess the property owners on the west side of the street at the same rate per foot as those on the east side, where the statute (L. 1897, ch. 738, as amd. by L. 1898, ch. 215 and L. 1901, ch. 384, § 11, sub. 2) creating a board of assessors in and for the city of Utica and defining its powers, directs the board to assess the expense of sewer construction "upon the lands benefited by the local improvement in proportion to such benefit;" since the assessment ignores the radical difference in the benefit conferred upon the west side property, which was already supplied with an adequate sewer paid for solely out of an assessment on the west side, and the

ASSESSMENT — Continued.

benefit conferred upon the east side property which was wholly without any sewer until the present improvement. *People ex rel. Keim v. Desmond*, 282

2. *Same — Certiorari to Review Assessment — When Facts Alleged in Petition Therefor Must Be Deemed to Be Admitted by Return.* Where the petition of owners of property, upon the west side of such street, for a writ of certiorari to review such assessment, alleges the facts above stated and the return of the assessors thereto alleges that the new sewer "as laid is a benefit to the property owners equally upon both sides of the street," but is silent as to material allegations of facts contained in the petition, the presumption is that the officers making the return intended to admit these allegations. It must, therefore, be deemed admitted that the first sewer at the time when the second sewer was constructed furnished adequate drainage to the property of the relators and that they did not need any additional sewer facilities for the drainage of their premises. *Id.*

ASSETS.

See Bradley v. Bridge (Mem.), 518; *Swift v. Am. Exchange Nat. Bank* (Mem.), 521.

ATTORNEY AND CLIENT.

Erroneous Enforcement of Attorney's Lien for Services. A proceeding to enforce an attorney's lien for services, upon a judgment recovered in an action for personal injuries suffered by his client, in which the issue is whether or not the agreement under which the attorney claims compensation is champertous, should not be summarily determined upon the petition and affidavits presented by the parties, where, although the agreement as set forth in the petition and affidavit of the attorney is not champertous, the client alleges that there was another agreement by which the attorney agreed to pay the expenses of the litigation if the client would sign the agreement fixing the attorney's compensation. The issue presented should not be determined until there has been a complete and thorough hearing of all the facts, either in open court or before a referee. *Matter of Speranza*, 280

See Matter of Weeks v. Coe (Mem.), 531.

AUTOMOBILES.

Speed contest on a public highway illegal.

See HIGHWAYS, 1, 2.

BAGGAGE.

Liability for loss of.

See CARRIERS.

BAIL.

Stay of proceedings — re-arrest of defendant released on bail pending determination of application for.

See CRIMES, 5, 6.

BANKRUPTCY.

An Adjudicated Bankrupt Not Divested of Title to Cause of Action Unless Trustee Has Been Appointed. A plaintiff is not precluded from recovering in an action for services rendered to the defendant by reason of the fact that he was adjudicated a bankrupt after the cause of action had accrued in his favor and before the beginning of the suit, where no trustee in bankruptcy was ever appointed. *Rand v. Iowa Central Ry. Co.* 58

BANKS.

See Kearny v. Met. Trust Co. (Mem.), 611.

BENEFIT ASSOCIATIONS.

See Butler v. Am. Legion of Honor (Mem.), 514.

BILLS, NOTES AND CHECKS.

1. *Promissory Note—When Evidence of Sufficient Funds to Pay Note Deposited by Maker with Payee, Immaterial.* In an action by the payee against the indorser of an accommodation promissory note, evidence that the maker had, some time subsequent to the maturity of the note, sufficient funds in the hands of the plaintiff to pay it is properly excluded in the absence of any direction to or agreement with the plaintiff to use the funds for that purpose. *Fur Rockaway Bank v. Norton.* 484

2. *Liability of Indorser to Payee—Negotiable Instruments Law, § 114.* The reception of evidence tending to establish the fact that the defendant had indorsed the note in suit with the purpose of giving the maker credit with the payee, even if erroneous, is immaterial, where the note was executed after the enactment of the Negotiable Instruments Law (L. 1897, ch. 612, § 114) which changed the rule that the indorser was presumed to be the second indorser and not liable to the payee and provided that "where a person not otherwise a party to the instrument places thereon his signature in blank before delivery, he is liable as indorser * * * if the instrument is payable to the order of a third person, * * * to the payee and all subsequent parties" *Id.*

See Cody v. Hadcox (Mem.), 520.

BONDS.

When Trust Company, Acting as Trustee for Mortgage Bonds, Not Liable as Guarantor of Bonds by Reason of Statement Indorsed Thereon. Where a trust company, as the trustee under a corporation mortgage, indorsed upon the back of each one of a series of bonds the statement that "This bond is one of a series of bonds mentioned and described in the mortgage within referred to," and the bonds so certified were each indorsed by the mortgagor as a "First Mortgage Bond," whereas in fact they were not such, being subsequently cut off by the foreclosure of a first mortgage, such statement does not upon any reasonable construction, in the absence of any fraud or deceit, active or passive, make the trustee a guarantor of the quality and extent of the security given by the mortgage, or responsible for the accuracy of statements indorsed upon the bond by the mortgagor purporting to describe the nature of such security. *Tschetnian v. City Trust Co.* 432

What constitutes waiver of payment of interest on corporate bonds.

See MORTGAGE.

BROKER.

When principal's fraud no bar to recovery of amount advanced him by broker on stock sold.

See PRINCIPAL AND AGENT, 1, 2.

CARRIERS.

Common Carrier—Stipulation in Ocean Steamship Ticket Limiting Liability for Loss of Baggage—Recovery Confined to Stipulated Amount. A stipulation in a passage ticket for an ocean voyage limiting the amount for which the carrier shall be liable for loss or injury to baggage, unless a declaration of value in excess of that sum is made, covers a loss of goods occasioned by negligence, although there is no express provision exempting the carrier from liability for its own negligence; and in the absence of such declaration a recovery must be limited to the stipulated amount. *Tewes v. North German L. S. S. Co.* 151

See Brinck v. N. G. L. S. S. Co. (Mem.), 525; Tewes v. N. G. L. S. S. Co. (Mem.), 525.

CAUSE OF ACTION.

When title to, not divested from adjudicated bankrupt.

See BANKRUPTCY.

CEMETERIES.

See *Palmer v. Hickory Grove Cemetery* (Mem.), 598.

CERTIORARI.

To review assessment — when facts alleged in petition must be deemed admitted by the return.

See *ASSESSMENT*, 2.

CHAMPERTY.

Erroneous enforcement of attorney's lien.

See *ATTORNEY AND CLIENT*.

CHARGE.

Erroneous refusal to charge as to liability for arrest.

See *FALSE IMPRISONMENT*, 1.

CHILDREN.

Right of adopted child to inherit.

See *REAL PROPERTY*, 1-4.

CITIES.

Taking of lands owned by city for street purposes — when city entitled to compensation.

See *NEW YORK (CITY OF)*, 1-3.

Obligation of street surface railroad to lay new pavement between its tracks.

See *RAILROADS*, 1, 2.

CODE OF CIVIL PROCEDURE.

1. §§ 362-415 — *Limitation of Actions* — Section 396 of the Code of Civil Procedure Not Affected by Chapter 572 of the Laws of 1886 — *Infancy*. Chapter 572 of the Laws of 1886, providing in substance that no action for negligence can be maintained against a municipality having 50,000 inhabitants or over, "unless the same shall be commenced within one year after the cause of action therefor shall have accrued," while it created a special limitation in respect to actions for personal injuries against a particular class of defendants, left that special limitation, like the general limitation prescribed in chapter 4 of the Code of Civil Procedure, subject to suspension during the existence of any of the disabilities specified in section 396, one of which is infancy. *McKnight v. City of New York*. 85

2. §§ 501, 502 — *Foreclosure of Mortgage by Assignee Thereof* — *When One of Two Defendants May Set Off Counterclaim Against Plaintiff's Assignor* — *When Plaintiff's Claim Extinguished Thereby*. Under the provisions of the Code of Civil Procedure (§§ 502, 1909) the assignment of a mortgage is subject not only to every defense, but to every counterclaim which might have been set up against the assignor; and in an action brought by an assignee to foreclose a mortgage executed by a husband and wife to secure the payment of a joint and several bond executed and delivered to the mortgagee at the same time, and to recover a money judgment against each defendant for any deficiency that might arise on the sale of the mortgaged property, the husband may, under section 501 of the Code of Civil Procedure, counterclaim and set off a claim existing in his own favor against plaintiff's assignor, and the allowance thereof inures to the benefit of both defendants; and where the claim is equal to or greater than the amount due on the bond and mortgage, it extinguishes the liability of both defendants and operates as a discharge of both instruments; the fact that the action is in form joint does not affect the principle involved. *American Guild v. Damon*. 380

3. § 1388 — *Appeal* — *Erroneous Reversal by Appellate Division of Judgment Directing Specific Performance*. The question whether a party is entitled to specific performance of an executory contract relating to personal

CODE OF CIVIL PROCEDURE — Continued.

property, or should be confined to an action at law to recover damages for a breach, rests in the sound discretion of the court; and upon an appeal from a judgment directing specific performance entered upon the report of a referee, although the Appellate Division in the exercise of its discretion may reverse upon the facts, where its order of reversal is silent as to the grounds thereof it must be assumed to have been based upon questions of law only; and if no error of law appears and there is evidence to sustain the findings of fact by the referee, the judgment must be affirmed. (Code Civ. Pro. § 1338.) *Butler v. Wright.* 259

§ 1909. See par. 2, this title.

4. § 1918 — *Judgments — Actions on Judgments for Money Between Original Parties to the Judgment — Effect of Statute (L. 1896, Ch. 568) Amending Section 1913 of Code of Civil Procedure.* The statute (L. 1896, ch. 568), which added to section 1913 of the Code of Civil Procedure, relating to actions upon judgments for a sum of money, between the original parties, a provision that such an action can be maintained when "ten years have elapsed since the docketing of such judgment," is retroactive in its application although it contains no affirmative declaration to that effect; and, hence, an action, commenced September 20, 1901, upon a judgment docketed November 8, 1881, may be maintained by the original plaintiffs against the original defendants without alleging compliance with either of the other requirements of section 1913. *Peace v. Wilson.* 468

CODE OF CRIMINAL PROCEDURE.

1. §§ 145, 148. — *Information — Sufficiency of.* An information sufficient to authorize a magistrate to issue a subpoena for the purpose of investigating whether a crime has been committed must be sworn to and cannot rest wholly on information and belief. Facts enough must be stated to show that the complainant is acting in good faith, and that he has reasonable grounds to believe that a crime has been committed by some person named or described. The law does not permit an inquiry based upon hearsay and the mere chance that some crime may be discovered, and a magistrate acts without jurisdiction upon an information of that character. *People ex rel. Livingston v. Wyatt.* 383

2. § 151 — *False Imprisonment — Conviction for Misdemeanor by a Justice of the Peace Proceeding Without Jurisdiction.* Where, upon a complaint charging cruelty to animals in the town of Mayfield, Fulton county, a justice of the peace of the city of Gloversville issued a warrant of arrest making it returnable before himself instead of before a justice of the town of Mayfield, as he was required to do by section 151 of the Code of Criminal Procedure, and the defendant objecting to the legality of the warrant and to the jurisdiction of the justice to try him, is subsequently convicted, his objection having been overruled, such magistrate is properly held liable for damages in an action of false imprisonment, since in proceeding with the trial he did not commit a mere error in ruling with respect to his jurisdiction, but was proceeding wholly without jurisdiction. *McCarg v. Burr.* 467

See, also, par. 1, this title.

§§ 194, 205. See par. 1, this title.

3. §§ 527, 529, 553, 556 — *Crimes — Stay of Proceedings — Bail.* A defendant, convicted of a crime not punishable with death, who has obtained an order directing the district attorney to show cause why a certificate of reasonable doubt should not be granted and an order directing a stay of execution in the meantime, cannot be admitted to bail until the hearing and determination of the motion for the certificate and the granting thereof. Under the statutes relating thereto (Code Crim. Pro. §§ 527, 529, 555, 556) release on bail can be secured only when a permanent and

CODE OF CRIMINAL PROCEDURE — Continued.

substantial stay of proceedings has been granted after the allowance of a certificate of reasonable doubt upon due notice to the district attorney of the county in which the conviction was had. The stay upon which bail may be granted is not the temporary *ex parte* stay which may be allowed pending the decision of an application for a certificate of reasonable doubt. In the former case a judge has decided, after argument and consideration, that there is doubt about the correctness of the conviction, and a reason is established for accepting bail and relieving from imprisonment pending appeal. In the latter case no certificate of doubt has been granted, and there is no reason for assuming that the judgment of conviction is erroneous and that the defendant should not be held in custody under it. *People ex rel. Hummel v. Reardon.* 164

§ 608. See par. 1, this title.

4. § 612 — *When Subpoena Issued by Magistrate to Discover Commission of a Crime Is Void.* A subpoena served upon a person reciting that a magistrate has "reason to suppose an offense has been committed and for the purpose of investigating whether it has been committed" commands such person to appear before him "for that purpose" and which does not name or describe any person as defendant (Code Cr. Pro. § 612) is void upon its face and calls for obedience to its commands on the part of no one. *People ex rel. Livingston v. Wyatt.* 383

COMMISSIONS.

See *Alt v. Doscher* (Mem.), 566.

CONDEMNATION.

See *Hudson & M. R. Co. v. Wendel* (Mem.), 535.

CONSTITUTIONAL LAW.

1. *Home Rule Provisions Not Applicable to New Offices — State Superintendent of Elections.* The purpose of the so-called home rule clauses of the Constitution (Art. 10, §§ 1, 2) was to preserve to the people of the local divisions of the state the power to select such local officers as they had theretofore selected, but not to give them the right to select new officers, even if their duties are local, providing their functions are new and the functions of existing officers are not interfered with. *Matter of Morgan v. Furey.* 202

2. *State Superintendent of Elections — Office New in Name and Functions.* The office of state superintendent of elections created by the Metropolitan Elections District Law (L. 1898, ch. 676; L. 1905, ch. 689) is new in name and essentially new in functions; the legislature, therefore, was authorized to provide for appointment of its incumbent by the governor instead of by some local authority and the law in that particular is a valid exercise of legislative power. *Id.*

Constitutionality of statute regulating the erection of telephone and telegraph lines on reservation of Tonawanda nation of Seneca Indians.

See **INDIANS**, 1.

Acts constituting a taking of property.

See **OFFICERS**, 6.

CONTEMPT.

See *Matter of Strong* (Mem.), 584.

CONTRACT.

1. *When Contract May Be Enforced by Action for Specific Performance after Attempted Rescission Thereof.* Where it is provided, in a contract for the sale and delivery of a designated quantity of pulp wood a year for a certain period of years, at a specified price per cord, that the vender should commence to cut the wood at a specified time each year for the

CONTRACT — Continued.

following season's supply, and that the vendee should make such advances to the vender as it might request during the progress of the work, but not more than approximately the cost of the work done, the balance of the purchase price to be paid at a specified time after the delivery of the wood to the vendee, and the vendee, from time to time, at the demand of the vender, advanced various sums until they aggregated an amount which the vendee believed and claimed was sufficient to comply with the contract, but which the vender claimed was insufficient and notified the vendee that the contract would be rescinded unless requests for further advances were complied with more promptly; the vender cannot, without other and more definite notice, and while negotiations for an arbitration of the differences between them were pending, during which time it accepted further advances from the vendee, return the moneys advanced and rescind the contract; and the vendee, having refused to accept the advances returned by the vender, and having insisted that the contract must be fulfilled, may maintain an action in equity for the specific performance thereof. *St. Regis Paper Co. v. Santa Clara Lumber Co.* 89

2. *Ante-nuptial Contract — Provision Thereof, Whereby Father Agreed to Make No Distinction Between His Son and Other Children in the Distribution of His Estate by Will — When the Son May Enforce the Contract by Action in Equity.* Where it was provided in formal marriage articles entered into by a father with his son and other interested parties, in contemplation of the marriage of the son, which took place a few days later, that the father should make no distinction between his children in the distribution of his estate by will, and the father subsequently died leaving a will whereby he carried out the agreement contained in the marriage articles, but by a codicil, executed a short time before his death, directed that the portion of his residuary estate, which he had bequeathed absolutely to the son, should be held in trust, the income thereof to be paid to such son during his life and upon his death the principal to go to his heirs at law, the corresponding portions of the residuary estate being given absolutely to the other children of the testator, the son, after the probate of the will and codicils and the final decree settling the estate and distributing it in accordance with the directions contained in the will and codicils, may maintain, against the trustees under his father's will, an action for the specific performance of the marriage contract, although he did not object to the probate of the will and codicils, or the judicial settlement and distribution in accordance therewith. *Phalen v. U. S. Trust Co.* 178

3. *Same — Failure of Son to Interpose Objections to Father's Will Does Not Preclude Maintenance of Action to Enforce Ante-nuptial Contract.* The contention, that if the ante-nuptial contract be held to be valid and enforceable, it will operate as a testamentary instrument which the son is precluded from enforcing because he interposed no objection to the probate of his father's will, is untenable, where the direct and only purpose of the agreement, plainly expressed, was to secure to the son an equal share with his sister in the distribution of his father's estate; since equity, if no good reason intervenes, will give effect to the expressed intention of the contract. *Id.*

4. *Same — Complaint in Equitable Action Not Demurrable Because Ante-nuptial Contract Would Not Support Action at Law.* The complaint in the action to enforce the ante-nuptial contract is not demurrable as failing to state a good cause of action, because the contract would not support an action at law, since there are many contracts upon which an action at law cannot be maintained that are enforceable in equity. *Id.*

5. *Same — Validity of Consideration of Ante-nuptial Contract.* The contention that there was no consideration as between the father and son which would enable the latter to maintain an action to enforce the ante-nuptial contract is without force and cannot be sustained; such agree-

CONTRACT — Continued.

ments are favored by the courts and have been upheld and enforced in equity whenever the contingency provided by the contract has arisen; furthermore, the son was a party to the agreement and performed on his part by the marriage to his wife; he had a legal interest in the complete execution of the contract, and the father having failed to perform the agreement to give the son the same share as that given to his sisters, the son can compel performance of the contract unless some good reason is made to appear why he should not be permitted to do so. *Id.*

6. *Construction of Contract for Articles to Be Delivered at Specified Times in the Future—Measure of Damages for Breach of Contract—Evidence.* Where it appears, in an action brought to recover damages alleged to have been suffered by plaintiff by reason of defendant's failure to take and pay for a certain number of granite paving blocks, that the order, made by defendant and accepted by plaintiff, which constituted the contract in question, merely stated that the defendant would take a specified number of granite blocks of specified sizes at a specified price per thousand to be delivered at a specified place, and there is nothing contained in the order or alleged in the complaint showing that the blocks were to be manufactured in the future or that they were required to be of any specified granite or to be taken from any particular quarry, so that the plaintiff might have fulfilled the contract by purchasing the blocks in the open market, or of any quarry owner, and delivering them to the defendant at the place specified, the measure of damages is the difference between the market value of the blocks and the contract price; it is error, therefore, after permitting the plaintiff to show that the blocks had no market value, to exclude evidence, offered by the defendant, to show that plaintiff's witnesses were mistaken and that there was a general market value for granite paving blocks. *Haddam Granite Co. v. Brooklyn H. R. R. Co.* 247

7. *Breach of Contract Employing Canal Boat for Fixed Period—When Owner of Boat Entitled to Recover Full Amount Named in Contract—Burden of Proof.* Where it was provided by a written contract between a contractor and a boatman that the latter should furnish a canal boat with its crew, horses and necessary equipment for the purpose of drawing sand from one port to another for a period of four weeks at a specified sum per week, and the contractor, after the boatman had entered into the performance of the contract and had been engaged eight days in drawing sand, terminated the contract by a notice in writing upon the ground that the boatman had not complied with an oral agreement alleged to have been made before the execution of the written contract by which the boatman was to draw a certain amount of sand in a boatload and tendered the amount due up to that time, and the boatman, after notifying the contractor that the boat and crew would be held at his command during the time called for by the contract, waited until the expiration of that time and then brought an action for the full amount named therein, the plaintiff is not precluded from recovering the amount claimed upon the ground that he was entitled only to the amount earned at the time the contract was terminated because he admitted upon cross-examination that he had made no attempt to obtain work during the remainder of the contract period, where he also testified that the boat was moored in a public place where any one who desired to secure the transportation of goods on the canal would be likely to go; the plaintiff was not bound to show affirmatively that employment was sought for and could not be found; the burden of proof rested upon the defendant to show that the plaintiff had found or could have found employment elsewhere. *Milage v. Woodward.* 252

8. *Building Contract—Failure to Comply with Specifications.* A building contract is not substantially performed by substituting, for that which is expressly required, materials, methods or workmanship which, in the opinion of the contractor and his experts are "just as good,"

CONTRACT — Continued.

unless the substitution relates to a matter of minor importance, is made in good faith and for sufficient reasons, and there is an adequate allowance for the difference. And where it appears from the record in an action to foreclose a mechanic's lien for a balance alleged to be due upon the contract price and for extra work in erecting a dwelling house, that the contractor willfully failed to comply with twenty or more of the express requirements of the specifications, and that no adequate excuse or explanation has been given for such failures, the evidence is not sufficient to support a finding of the trial court that there was a substantial performance of the contract. *Easthampton L. & C. Co. v. Worthington*. 407

9. *Lease for Mining Coal — Agreement by Lessee to Pay Fixed Royalty on Coal of Designated Size and Quality — When Lessor Is Entitled to Royalty on Coal of Inferior Size and Quality.* Where the lessee of coal lands agreed to pay a certain royalty per ton for all coal of a designated quality and size taken by it, the contract being silent as to payments for coal of inferior quality or smaller size, and it has been held in a previous action between the parties that "the lessee was not obliged to take coal of inferior size or quality, but it had the right to take such coal if it chose, in which case it was bound to pay royalty upon it the same as upon other coal;" the asportation of coal, of inferior size and quality, from the lands of the lessor to the lands of the lessee and mingling it with coal of similar size and quality owned by the latter, thereby exercising exclusive control and dominion over such coal and removing it beyond the power of the lessor to assert her ownership thereof, constitutes an exercise of the lessee's option to take all of such coal as marketable coal under the contract, so that the lessor is entitled to the payment of the royalty thereon. *Genet v. D. & H. C. Co.* 422

See *Walter v. Rafalsky* (Mem.), 548; *Ely v. Dumont* (Mem.), 552; *Johnston v. L. I. Investment, etc., Co.* (Mem.), 558; *Herzog Telesens Co. v. Majestic Hotel Co.* (Mem.), 568; *St. Regis Paper Co. v. T. B. & P. Co.* (Mem.), 568; *Bier v. Bash* (Mem.), 565; *Triest v. Vassar* (Mem.), 565; *Fuehrman v. McCord* (Mem.), 566; *Dressner v. Dressner* (Mem.), 568; *Middleton v. Farrell* (Mem.), 572; *Windmuller v. Standard D. & D. Co.* (Mem.), 572; *Merker v. Bultman* (Mem.), 578; *Niles v. Sire* (Mem.), 573; *Callahan v. Godwin* (Mem.), 578; *Boisnot v. Wilson* (Mem.), 593; *H. R. Water Power Co. v. G. F. P. Cement Co.* (Mem.), 597; *Theall v. Vil. of Port Chester* (Mem.), 602; *Molloy v. City of New Rochelle* (Mem.), 603; *Buffalo L. T. & S. D. Co. v. Carstensen* (Mem.), 608; *Jacobson v. Stone* (Mem.), 608; *Grant v. Pratt & Lambert* (Mem.), 611; *Conlon v. Mission of Immaculate Virgin* (Mem.), 618; *Eastman Kodak Co. v. Kleinhans* (Mem.), 613.

Specific performance.

See *APPEAL*, 2.

Of sale — parol evidence of express warranty.

See *EVIDENCE*, 2.

Of life insurance — premature action to recover damages for repudiation by company of its obligation under a policy.

See *INSURANCE*, 1, 2.

Deduction of semi-annual premium from amount due on policy of life insurance.

See *INSURANCE*, 3.

CONVERSION.

See *N. Y. B. & P. Co. v. Bronx Borough Bank* (Mem.), 559; *Twaddell v. Weidler* (Mem.), 601.

CORPORATIONS.

1. *Personal Liability of Directors for Wasted Funds.* Directors of a corporation who fail to administer its affairs honestly and with reasonable prudence, not through excusable neglect, but by actual misfeasance in appropriating corporate funds to their own use, are personally liable to a receiver of the corporation for the damages which their misconduct has occasioned to the corporation. *Bowers v. Male.* 28

2. *Same.* The facts examined in an action by the receiver of an insolvent credit insurance company against its directors personally to recover sums alleged to have been wasted by the defendants in the purchase of the worthless stock of another corporation under the control of said company, and held to establish the personal liability of the defendants. *Id.*

3. *Reduction of Number of Directors—Stock Corporation Law, § 21.* A resolution to reduce the number of directors of a stock corporation under section 21 of the Stock Corporation Law (L. 1890, ch. 564, amd. L. 1903, ch. 750) does not take effect until the date of the filing in the proper offices of the transcript of the proceedings of the meeting at which the resolution was adopted; the simple adoption of the resolution is insufficient to reduce the number of directors; nor does a subsequent filing relate back so as to give effect to a resolution not operative of itself. *Matter of Westchester Trust Co.* 215

4. *Stock Corporations—Increase in Capital Stock Thereof—Right of Stockholder to Subscribe for His Proportionate Share of New Stock.* A stockholder in a domestic corporation has an inherent right to a proportionate share of new stock issued for money only and not to purchase property for the purposes of the corporation or to effect a consolidation, and while he can waive that right, he cannot be deprived of it without his consent except when the stock is issued at a fixed price not less than par and he is given the right to take at that price in proportion to his holding, or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources. *Stokes v. Continental Trust Co.* 285

5. *Same—When Stockholder's Right to Take New Stock Not Waived by His Demand to Buy It at Par—When He May Recover Damages upon Sale of His Share of New Stock to Third Party—Measure of Damages.* Where a stockholder in a domestic corporation consented to an increase of capital stock, but protested against the acceptance of a proposition to sell the new stock, when issued, to a third party at a fixed price, and demanded the right to subscribe and pay for his proportionate share of the new stock at par, which demand was refused by the corporation and a resolution thereafter adopted directing the sale of all the new stock, when issued, to a third party at a fixed price, which was less than the market value of such stock at the time it was issued and delivered, such stockholder, by demanding his proportionate share of the new stock at par, did not thereby waive his right to take it at the fixed price at which it was sold to the outside party, since the price was not fixed until after he had made his demand. After the price was fixed it was the duty of the directors of the corporation to give him an opportunity to purchase at that price before they could sell his property to a third party, even with the approval of a large majority of the stockholders. The stock having been sold to a third party without any opportunity being given to the stockholder to take it at the fixed price, he can recover from the corporation the difference between the value of his stock at that price and the market value of the stock upon the day that it was delivered to the third party. *Id.*

When may maintain actions for libel.

See LIBEL, 1.

CORPORATIONS — Continued.

What constitutes waiver of payment of interest on corporate bonds — when action to foreclose trust mortgage precluded.

See MORTGAGE.

Stock — transfer tax.

See TAX, 1.

COUNTERCLAIM.

When failure to reply does not preclude plaintiff from contesting counterclaim — foreclosure of mortgage by assignee thereof — when one of two defendants may set off counterclaim against plaintiff's assignors.

See SET-OFF, 1, 2.

COUNTIES.

See *County of Jefferson v. County of Oswego* (Mem.), 555.

COURT OF APPEALS.

Jurisdiction to review legislative apportionment.

See APPEAL, 1.

When facts found by trial court are conclusive on.

See APPEAL, 4.

When may reverse order of Appellate Division affirming judgment upon exceptions to refusal of trial court to make specific findings of fact.

See APPEAL, 6.

CREDITOR'S SUIT.

When judgment creditors may maintain action to charge property held under trust.

See TRUST, 1, 2.

CRIMES.

1. *Uttering of Forged Note — Evidence of the Uttering of Other Forged Notes by Defendant — When Admissible.* Where the only issue, upon the trial of a defendant charged with feloniously uttering a forged note with intent to defraud, is whether the defendant knew that the note was forged at the time that he indorsed it and had the amount thereof credited upon his bank account, evidence of the indorsement and uttering of other forged notes by the defendant is competent, especially where it appears that all of the notes were made at about the same time; that in each case the note was made payable to the defendant and indorsed by him; that during the period covered by all of the notes the defendant was in financial difficulties and endeavoring to raise funds to meet his obligations, and that in each case he used the name of some person or firm with whom he had done business and with whose affairs he was familiar, so that this combination of circumstances was sufficient to establish a common plan and identity of method so connected as to have a strong tendency to overcome any claim of innocent intent in the uttering of the note charged in the indictment. *People v. Dolan.* 4

2. *Same — When Contents of Forged Papers May Be Proved by Secondary Evidence.* While it is the general rule that, where it is sought to give evidence of other forgeries than the one charged in the indictment, the forged papers upon which such evidence is predicated must be produced, yet where such papers have not been produced by the defendant pursuant to notice served upon him by the prosecution, and there is evidence that the forged papers were returned to the defendant in the ordinary course of business, a question of fact is presented for the determination of the trial judge, and his decision thereon, permitting the

ORDICES — Continued.

prosecution to give secondary evidence of the contents of the forged papers, is not reviewable in the Court of Appeals. *Id.*

3. *Same — Self-serving Declarations and Hearsay Statements.* While the defendant is entitled to introduce all proper evidence of facts tending to show that he did not know that the note was a forgery, and of facts bearing upon the question of his intent in uttering the note, yet he is not entitled to testify to self-serving declarations and hearsay statements to the effect that his clerk had admitted to him and to the president of the bank at which the note was discounted, that she had made the note herself, especially where the clerk was present at the trial and might have been called as a witness. *Id.*

4. *Same — Erroneous Taking of Exhibits by Jury — When Such Error Does Not Warrant Reversal of Judgment of Conviction.* Where exhibits introduced in evidence by the prosecution were taken into the jury room, by mistake or otherwise, without the consent of the defendant, but no objection was made to the jury having them until after a verdict had been rendered against the defendant, more than an hour thereafter, such fact does not constitute such a substantial error as to warrant the Court of Appeals in awarding a new trial, especially where the papers had been examined by the jury during the trial and it does not appear what, if any, use was made of them in the jury room. *Id.*

5. *Stay of Proceedings — Bail.* A defendant, convicted of a crime not punishable with death, who has obtained an order directing the district attorney to show cause why a certificate of reasonable doubt should not be granted and an order directing a stay of execution in the meantime, cannot be admitted to bail until the hearing and determination of the motion for the certificate and the granting thereof. Under the statutes relating thereto (Code Crim. Pro. §§ 527, 529, 555, 556) release on bail can be secured only when a permanent and substantial stay of proceedings has been granted after the allowance of a certificate of reasonable doubt upon due notice to the district attorney of the county in which the conviction was had. The stay upon which bail may be granted is not the temporary *ex parte* stay which may be allowed pending the decision of an application for a certificate of reasonable doubt. In the former case a judge has decided, after argument and consideration, that there is doubt about the correctness of the conviction, and a reason is established for accepting bail and relieving from imprisonment pending appeal. In the latter case no certificate of doubt has been granted, and there is no reason for assuming that the judgment of conviction is erroneous and that the defendant should not be held in custody under it. *People ex rel. Hummel v. Reardon.* 164

6. *Same — Re-arrest of Defendant Released on Bail Pending Determination of Application for Stay of Proceedings — Habeas Corpus — Erroneous Affirmance of Order Releasing Relator from Custody.* Where a defendant, who had been convicted of the crime of conspiracy, and released on bail pending the decision of his application for a certificate of reasonable doubt, was re-arrested upon the ground that the allowance of bail was without authority and illegal, and he thereupon instituted habeas corpus proceedings which resulted in his discharge from custody, the Appellate Division is not warranted in affirming the order discharging him, because at the time its decision was made a certificate of reasonable doubt had been granted entitling him to be released upon bail. The order should have been reversed, but the decision of the Appellate Division so framed as not to remand the relator to a custody from which he would be entitled to an immediate release. *Id.*

7. *Writ of Prohibition.* Where on the return to an alternative writ of prohibition to restrain the further proceedings of a magistrate before whom an information is laid, the relator neither traverses the return nor

CRIMES — Continued.

moves for a new one, but moves for an absolute writ without a trial of the issues, the return is conclusive as to all matters denied by the respondent and as to any new matter alleged therein not denied by the relator, including the substance of the information. *People ex rel. Livingston v. Wyatt.* 383

8. *Crimes — Verification of Information.* An information will be regarded as verified, if returned as made "upon the information and belief of the affiant" that a crime has been committed by a person named. *Id.*

9. *Information — Sufficiency of — Code Cr. Pro.* §§ 145, 148, 151, 194, 205, 608. An information sufficient to authorize a magistrate to issue a subpoena for the purpose of investigating whether a crime has been committed must be sworn to and cannot rest wholly on information and belief. Facts enough must be stated to show that the complainant is acting in good faith, and that he has reasonable grounds to believe that a crime has been committed by some person named or described. The law does not permit an inquiry based upon hearsay and the mere chance that some crime may be discovered, and a magistrate acts without jurisdiction upon an information of that character. *Id.*

10. *When Subpœna Issued by Magistrate to Discover Commission of a Crime Is Void.* A subpoena served upon a person reciting that a magistrate has "reason to suppose an offense has been committed, and for the purpose of investigating whether it has been committed" commands such person to appear before him "for that purpose," and which does not name or describe any person as defendant (Code Cr. Pro. § 612), is void upon its face and calls for obedience to its commands on the part of no one. *Id.*

11. *Remedy of Person Served with Void Subpœna Is by Writ of Habeas Corpus Not by Writ of Prohibition.* The remedy of a person served with a void subpoena is not by an application for a writ of prohibition to restrain the magistrate from further proceeding with the investigation; that writ is issued only in the exercise of a sound judicial discretion when there is no other remedy; he may properly refuse to obey the subpoena, and if any attempt is made to punish him he may have relief through the writ of habeas corpus, which, if denied him in the first instance, may be secured on appeal. *Id.*

12. *Grand Larceny — Parting with Property for an Illegal Purpose.* The rule, that when a person is induced either by trick or device or false representations to part with his property for an illegal purpose, a conviction cannot be had of the person charged with the offense, is firmly established in this state and cannot be changed by the courts without ignoring constitutional rights and usurping legislative power. The alteration of the rule, however, is suggested to the legislature. *People v. Tompkins.* 413

See People v. Ellenbogen (Mem.), 603.

DAMAGES.

Negligence — Loss of Income as an Element of Damage. The fact that the plaintiff, in an action to recover damages for personal injuries, had \$1,000 invested in his business does not justify the trial judge in refusing to submit to the jury the plaintiff's alleged loss of earnings or income as an element of the damages on the ground that there was no evidence to show how much of his income had been derived from his invested capital and how much from his personal efforts; where it appears that his business involved the investment of capital merely as an incident or vehicle to the performance of services almost if not quite personal in their nature, and the amount of his income was about \$3,000 annually; and such ruling constitutes reversible error. *Kronold v. City of New York.* 40

Measure of, for breach of contract.

See CONTRACT, 6.

DEBTOR AND CREDITOR.

Erroneous exclusion of testimony tending to show inconsistency of plaintiff's claim.

See EVIDENCE, 3.

When testamentary trust void as to creditor of *cestui que trust*.

See TRUST, 1, 2.

DECEDENT'S ESTATE.

Death of legatee before payment of legacy — presumption as to testator's intention — legacy passes to issue of deceased legatee and not to his devisees.

See WILL, 1-3.

DEED.

See *Coley v. Tallman* (Mem.), 569; *Irving v. Bruen* (Mem.), 605.

DIRECTORS.

Of corporations — personal liability for wasted funds

See CORPORATIONS, 1, 2.

Reduction of number of.

See CORPORATIONS, 3.

DIVORCE.

See *Percival v. Percival* (Mem.), 587.

EJECTMENT.

When occupant of lands may maintain action of, against telephone company erecting poles and wires on his lands.

See INDIANS, 1, 2.

Occupation by telephone wires of space above land.

See REAL PROPERTY, 5.

ELECTIONS.

1. *Election Law — Certificate for Independent Nomination Valid, Although Made for the Nomination of More Than One Candidate.* When certificates for independent nominations, made and filed under the provisions of the Election Law (L. 1896, ch. 909, §§ 57, 58 and 59), are required to be filed in the same office, one of such certificates is not invalid because made for the nomination of more than one candidate where the electors making it are qualified to make a certificate for the nomination of all of the candidates mentioned therein. *Matter of Independent Nominations.*
266

2. *Independent Nomination for Member of Assembly — Whether Nominee Disqualified Because He Is a Commissioner of Deeds Must Be Determined by Assembly if He Be Elected.* The question whether a person nominated in a certificate for an independent nomination is disqualified from election as a member of assembly because he is a commissioner of deeds cannot be determined in a proceeding to review a determination of the board of elections of the city of New York as to the validity of a certificate of nomination, but must be left to the assembly to determine in case of his election.
Id.

3. *Contest Between Several Sets of Local Independence League Nominations — When Certificate First Filed Is Entitled to Preference.* Where there is a contest between several sets of local Independence League nominations the certificate first filed under that title is entitled to preference, provided that, under the provisions of section 56 of the Election Law, it was filed by the same "independent body" which had made the

ELECTIONS — *Continued.*

state nominations. Whether the electors who joined in the first certificate or those who made the second certificate were the same "independent body" presents a question of fact on which the Court of Appeals is concluded by the decisions of the courts below. *Id.*

EMINENT DOMAIN.

When exercise of power of, not authorized by statute directing survey.

See OFFICERS, 3.

EQUITY.

Enforcement in, of ante-nuptial contract.

See CONTRACT, 2-5.

Repudiation by insurance company of its obligation — remedy in equity.

See INSURANCE, 1, 2.

ESTATES.

Death of legatee before payment of legacy — presumption as to testator's intention — legacy passes to issue of deceased legatee and not to his devisees.

See WILL, 1-3.

EVIDENCE.

1. *Expert Witness — Erroneous Admission of Opinion of Expert upon Question of Fact Determinable by a Jury.* It is reversible error, upon the trial of an action brought to recover for injuries caused by the slipping of a pot filled with acid from a hook by which it was to be lifted, to permit an expert witness to state, from an examination of the hook and a statement of the evidence describing the apparatus with which the pot and hook were used and the manner in which the pot slipped off the hook, that, in his opinion, the cause of the pot slipping from the hook was "from the use of a short and open-mouthed hook" furnished by the defendant; since it was for the jury to determine, from all the facts, together with the statements of experts relating to matters of which the mass of mankind are not supposed to be acquainted, whether the cause of the pot slipping from the hook was one for which the defendant was responsible; the answer to that question did not require professional or scientific knowledge or skill; it could be answered by persons of ordinary training and intelligence and was not a subject for expert opinion. *Wells v. Celluloid Co.* 319

2. *Admissibility of Parol Evidence to Complete Written Agreements Executed Subsequent to an Oral Contract.* Parol evidence of an express warranty of a machine sold and delivered under an oral contract is admissible, where supplementary written agreements, under which it is claimed the machine was sold, examined in the light of all the facts and circumstances, do not contain the entire agreement of the parties, but are merely modifications of the original oral contract in respect to the terms of payment, and such evidence is not inconsistent with or contradictory of the written agreements. *Cooper v. Payne.* 334

3. *Erroneous Exclusion of Testimony Tending to Show Inconsistency of Plaintiff's Claim.* Where the evidence in an action to recover alleged indebtedness consists principally of the testimony of the parties, each testifying in support of his own claim, it is reversible error to exclude a letter written by the plaintiff to defendant several months after the indebtedness was claimed to have arisen, in which the defendant was requested to perform a service for the plaintiff for which the latter promised to pay him as soon as convenient, since the defendant should be

EVIDENCE — Continued.

allowed to urge before the jury the inconsistency of plaintiff's claim that he was indebted to him at the time alleged. *Broadwell v. Conover*, 429.

Of sufficient funds to pay promissory note deposited by maker with payee, immaterial.

See **BILLS, NOTES AND CHECKS**, 1, 2.

Erroneous exclusion of.

See **CONTRACT**, 6.

Of utterance of other forged notes by defendant on trial for forgery, when admissible — when contents of forged papers may be proved by secondary evidence — self-serving declarations and hearsay statements.

See **CRIMES**, 1-3.

Presumption of undue influence arising from meretricious relations one of fact.

See **EXTORTION**, 1, 2.

EXECUTORS AND ADMINISTRATORS.

See *Matter of Waterman* (Mem.), 534.

EXTORTION.

1. *Evidence — Presumption of Undue Influence Arising From Meretricious Relations One of Fact.* The presumption that a woman living in meretricious relations with a man has by the exercise of undue influence obtained money from him is a presumption of fact not of law; it leaves the trial court at liberty to find undue influence from the fact of such relation, but does not compel it to do so, especially in a case where the presumption is overcome by testimony. *Platt v. Elias*. 374

2. *Immoral Consideration Not Recoverable.* Where illicit sexual intercourse is the consideration for the payment of money and the money has been paid the courts will not aid the donor to recover it. *Id.*

FALSE IMPRISONMENT.

1. *Erroneous Refusal to Charge as to Liability for Arrest.* Where it appears in an action to recover damages for false imprisonment that the person making the arrest was a special patrolman appointed by the police board of the city of New York, at the request of the defendant, under section 308 of the charter (L. 1897, ch. 878), which provided that such patrolman should "possess all the powers and discharge all the duties of the police force applicable to regular patrolmen," but that he should be paid by the party upon whose application he is appointed, and the trial court expressly charges that the acts of the officer in connection with the arrest of the plaintiff were performed in his capacity as a police officer, it is reversible error to refuse to charge that the defendant was not liable therefor, since the latter was liable only for the acts of the officer, committed by him as its employee. *Tyson v. Bauland Co.* 397

2. *Conviction for Misdemeanor by a Justice of the Peace Proceeding Without Jurisdiction.* Where, upon a complaint charging cruelty to animals in the town of Mayfield, Fulton county, a justice of the peace of the city of Gloversville issued a warrant of arrest making it returnable before himself instead of before a justice of the town of Mayfield, as he was required to do by section 151 of the Code of Criminal Procedure, and the defendant objecting to the legality of the warrant and to the jurisdiction of the justice to try him, is subsequently convicted, his objection having been overruled, such magistrate is properly held liable for damages in an action of false imprisonment, since in proceeding with the trial he did not commit a mere error in ruling with respect to his jurisdiction, but was proceeding wholly without jurisdiction. *McCarg v. Burr.* 487

FALSE REPRESENTATIONS.

See Nester v. Colter (Mem.), 568; *Silverman v. Minsky* (Mem), 576;
Dougherty v. Neville (Mem.), 578.

FORECLOSURE.

What constitutes waiver of payment of interest on corporate bonds—when precludes action to foreclose trust mortgage.

See MORTGAGE.

Of mortgage by assignee—when one of two defendants may set off counterclaim against plaintiff's assignor.

See SET-OFF, 2.

FORGERY.

Uttering of forged note—when evidence of utterance of other forged notes by defendant admissible—when contents of forged papers may be proved by secondary evidence.

See CRIMES, 1-4.

FRANCHISE TAX.

See People ex rel. Sixty Wall Street v. Kelsey (Mem.), 543.

FRAUD.

See Waite v. Greenleaf (Mem.), 558.

Fraud of principal a defense to action by agent to recover purchase price of stock sold.

See PRINCIPAL AND AGENT, 1, 2.

GAS COMPANIES.

Enforcement of act regulating price of gas.

See JURISDICTION.

GUARANTY.

See Wanamaker v. Powers (Mem.), 562; *Boyer v. Lugar* (Mem.), 569.

Of mortgage bonds.

See BONDS.

HABEAS CORPUS.

Re-arrest of defendant released on bail pending determination of application for stay of proceedings.

See CRIMES, 6.

HIGHWAYS.

1. *Speed Contest by Automobiles on Public Highway—When Spectator Injured Thereby Cannot Recover Because Contest, and Use of Highway, Was Illegal.* While the use of a certain public highway within the city of New York as a racecourse for automobiles competing against time, and the holding of an automobile race thereon by certain specified persons, which was authorized by a special ordinance, was illegal not only because the ordinance was invalid as a regulation of the speed of automobiles but because it permitted the use of a public highway for a private purpose and it operated as a participation of the city in the commission of the unlawful act, yet, where a person came to such highway at the time of the race, not as a traveler or casual spectator traveling in the vicinity, but for the express purpose of witnessing the race, knowing it was to be a contest and that the automobiles would be driven at the greatest possible speed, and, while witnessing the race, was injured by an automobile, deflected from the course, running at high speed, it is reversible error, upon the trial of an action brought by such injured person against the city and the persons conducting the race, to direct a verdict for the plaintiff upon the ground that the speed contest, and the use of

HIGHWAYS—Continued.

the highway for that purpose, was illegal and a nuisance and submit to the jury only the question of damages. *Johnson v. City of New York*.

139

2. *Same—Liability of Defendants Dependent upon Question of Fact Whether They Were Guilty of Negligence or of Committing a Nuisance in the Manner of Conducting the Race.* The fact that the race and the use of the highway for that purpose were illegal does not render the city or the parties participating in the race liable to the plaintiff, regardless of any element of negligence or other misconduct. As between the plaintiff and these defendants the legality or illegality of the exhibition given and witnessed so far as that illegality depends on the obstruction and appropriation of the highway was not the material factor. It did not create a liability against the defendants if they were at fault in the conduct of the race in no other respect. It does not preclude a recovery by the plaintiff if the injury to her was caused by the misconduct or fault of the defendants. Whether the contest as conducted was in fact a nuisance, whether the defendants, or any of them, were guilty of negligence in the management of the race and the contributory negligence, if any, on the part of the plaintiff, were all questions of fact which the trial court should have submitted to the jury for determination. *Id.*

See Matter of Adolph (Mem.), 547; *Matter of Webster* (Mem.), 549.

HUSBAND AND WIFE.

Ante-nuptial contract by which father of son about to marry agreed to provide equally for all of his children by will—when son may enforce contract.

See CONTRACT, 2-5.

INDIANS.

1. *Tonawanda Nation of Seneca Indians—Jurisdiction of State of New York Over Lands Owned by Nation and Members Thereof—Constitutionality of Statute (L. 1902, Ch. 296) Regulating the Erection of Telephone and Telegraph Lines upon Such Reservation and Lands.* Under a decision, made in 1786, by commissioners appointed by the states of Massachusetts and New York to settle a controversy between such states relating to lands now held by the Tonawanda Nation of Seneca Indians, and under a subsequent treaty between such tribe and the United States government, the state of New York exercises exclusive sovereignty and jurisdiction over the Tonawanda Nation of Seneca Indians and the lands held by such nation or by individual members thereof, and consequently the provisions of the United States statutes enacted for the regulation of commerce with the Indian tribes pursuant to the Constitution of the United States (U. S. Const. art. 1, § 8, subd. 3) are not violated by the statute (L. 1902, ch. 296) amending the Indian Law (L. 1892, ch. 679) by adding thereto a new section (89), providing that when any telephone or telegraph company shall erect poles, for the purpose of supporting telephone or telegraph wires, upon lands allotted to or otherwise owned by individual members of the Seneca Nation on the Tonawanda reservation, the damages caused thereby, to be fixed by agreement or in condemnation proceedings, shall be paid to such owners in addition to any sum paid to the council of the nation for the privilege of erecting poles upon the reservation. *Jemison v. Bell Telephone Co.*

498

2. *Same—When Lands Occupied by Members of Nation Deemed to Have Been Allotted Under the Indian Law (L. 1892, Ch. 679, § 56)—When Occupant of Lands May Maintain Action of Ejectment Against Telephone Company Erecting Poles and Wires on His Lands.* Where a member of the Tonawanda Nation of Seneca Indians has occupied and been in undisputed possession of lands within the reservation,

INDIANS — *Continued.*

purchased by his mother from the chiefs of the nation in 1859, for a period of more than twenty-two years, the presumption that such occupant holds the lands under an allotment within the meaning of section 56 of the Indian Law (L. 1892, ch. 679, § 56) is controlling, and he must be deemed to be the owner in fee, having the full Indian title, as a member of the Tonawanda Nation of Seneca Indians, to the land in question, subject to the easement of the public, for the purposes of travel in a highway running through such lands; and as such owner in fee is entitled to maintain an action of ejectment against a telephone company which has erected telephone poles and stretched wires upon his lands along the highway without his consent, notwithstanding the fact that the company has obtained permission from the council of the nation to erect such poles and wires across the lands of the reservation. *Id.*

INFANCY.

Suspension during infancy of limitation of time within which action for negligence against municipality must be commenced.

See LIMITATION OF ACTIONS.

INHERITANCE.

Right of adopted child.

See REAL PROPERTY, 1-4.

INJUNCTION.

See Fox v. N. Y. C. Interborough Ry. Co. (Mem.), 524; *Ebling Brewing Co. v. N. Y. C. Interborough Ry. Co.* (Mem.), 524; *Grossman v. Consolidated Gas Co.* (Mem.), 541.

INSURANCE.

1. *Premature Action to Recover Damages for the Repudiation by a Mutual Life Insurance Company of Its Obligation Under a Policy.* The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages is usually applied only to contracts of a special character, even in jurisdictions where it obtains at all; it is not generally applied to contracts for the payment of money at a future time, and has not been extended in this state to such contracts made by mutual life insurance companies. *Kelly v. Security Mut. L. Ins. Co.* 16

2. *Remedy of Policyholder Is an Equitable Action to Preserve Contract of Insurance.* Where in an action upon a policy issued by a mutual life insurance company to recover damages for an alleged breach of its contract to pay a sum of money on the death of the plaintiff, the only allegation in the complaint as to a breach was that the defendant wrongfully declared the contract "void and forfeited, denied that the plaintiff had any right thereunder," and refused "to continue said policy in force," a judgment for damages cannot be sustained, since the time not having arrived for performance the policy is still in force and an action at law will not lie; the plaintiff's remedy, if any, is in equity to compel recognition by the defendant of its obligations under the policy. *Id.*

3. *Life Insurance Policy — Deduction of Semi-annual Premium from Amount Due.* Where a life insurance policy, the premium of which was made payable semi-annually, contained the condition, which in terms was made part of the contract of insurance, that "Although the contract is based on the receipt of premiums annually in advance, the premium may be made in semi-annual or quarterly installments in advance, but in such case any future installments which at the maturity of the contract are necessary to complete the full year's premium shall be deducted from the amount of the claim," and the insured died during the first half of a policy

INSURANCE—*Continued.*

year, the semi-annual premium for that period having been paid, the insurance company is entitled to deduct from the policy the semi-annual premium for the second half of the insurance year. *Bracher v. Equitable L. Assur. Socy.* 62

See Howell v. J. H. M. Life Ins. Co. (Mem.), 556; *Arlington Co. v. Colonial Assurance Co.* (Mem.), 570; *Jennings v. L. A. Benefit Assn.* (Mem.), 571; *Hatton v. C. B. Legion* (Mem.), 577; *O'Shaughnessy v. Aetna Life Ins. Co.* (Mem.), 589; *Porter v. P. A. Ins. Co.* (Mem.), 599; *Chamberlain v. Home Ins. Co.* (Mem.), 601.

Proceeds of policy upon life of non-resident of state not subject to transfer tax.

See TAX, 2.

INTEREST.

What constitutes waiver of payment of interest on corporate bonds.

See MORTGAGE.

JUDGMENT.

1. *Actions on Judgments for Money Between Original Parties to the Judgment*—*Effect of Statute* (L. 1896, Ch. 568) Amending Section 1913 of Code of Civil Procedure. The statute (L. 1896, ch. 568) which added to section 1913 of the Code of Civil Procedure, relating to actions upon judgments for a sum of money, between the original parties, a provision that such an action can be maintained when "ten years have elapsed since the docketing of such judgment," is retroactive in its application although it contains no affirmative declaration to that effect; and, hence, an action, commenced September 20, 1901, upon a judgment docketed November 3, 1881, may be maintained by the original plaintiffs against the original defendants without alleging compliance with either of the other requirements of section 1913. *Peace v. Wilson.* 403

2. *New York (City of)—Marine Court—Change in Name.* The statute (L. 1883, ch. 26) providing that on and after the 1st day of July, 1888, the Marine Court of the city of New York, established as a court of record in 1876, should be designated as the City Court of New York, merely changed the name of the court and had no effect upon proceedings past or pending; and a judgment obtained in the Marine Court and docketed in New York county on the 3d day of November, 1881, is not the judgment of an "extinct court," but may be enforced like any other judgment of a court of record. *Id.*

JURISDICTION.

New York City—Gas Companies—United States Circuit Court Injunction Restraining the Enforcement of Eighty Cent Gas Act (L. 1906, Ch. 125) *No Bar to Action in State Court by Consumer Restraining Gas Company From Cutting Off Gas—Principle of Comity Not Applicable.* An injunction issued by the Circuit Court of the United States in a suit by the Consolidated Gas Company of the city of New York to determine the constitutionality of chapter 125 of the Laws of 1906 fixing the maximum price of gas in that city at eighty cents per 1,000 feet, alleged to be invalid as in contravention of the 14th amendment of the United States Constitution and of section 10 of article 1 thereof, and to restrain the enforcement of the provisions of the statute, does not prevent the maintenance of an action in the Supreme Court of this State by a consumer not a party to the former suit, to restrain the gas company from cutting off the gas from his premises for failure to pay the rate authorized before the enactment of the statute, where, although the injunction of the United States court permitted such rate to be charged, the difference to be paid into court to await the determination of the controversy, it contained no provision

JURISDICTION — *Continued.*

requiring a consumer to pay the former rate or to refrain from defending any action to recover that amount or from maintaining any action to prevent the company from enforcing payment by cutting off gas from his premises; an injunction order in such action granting the relief sought is not in conflict with that issued by the United States court, and there is nothing in the principle of comity prohibiting the state court from entertaining jurisdiction to the extent of granting it. *Richman v. Consolidated Gas Co.* 209

Of Court of Appeals to review legislative apportionment.

See APPEAL, 1.

Of justice of the peace — when justice liable for false imprisonment.

See FALSE IMPRISONMENT, 2.

Of state over lands owned by Tonawanda Nation of Seneca Indians and members thereof.

See INDIANS, 1.

JURY.

Erroneous taking of exhibits by.

See CRIMES, 4.

JUSTICE'S COURT.

Conviction for misdemeanor by justice proceeding without jurisdiction — when justice liable for false imprisonment.

See FALSE IMPRISONMENT, 2.

LANDLORD AND TENANT.

See Fox v. Hopkins (Mem.), 515; *Smith v. Hirsch* (Mem.), 590; *Ross v. Bayer-Gardner-Hines Co.* (Mem.), 612.

Liability of landlord for damages caused by third party.

See LEASE, 1.

Covenant for renewal of lease.

See LEASE, 2.

LARCENY.

See People v. Rogers (Mem.), 516.

Inducing person to part with property for illegal purposes — when does not constitute larceny.

See CRIMES, 12.

LEASE.

1. *Liability of Landlord for Damages Caused by Third Party.* A provision in a lease that the lessors shall not be liable to the lessee for damages caused by leakage of the roof unless they neglect to make the necessary repairs within a reasonable time after receiving a written notice of such leakage from the lessee, will not exempt them from liability for damages caused by leakage, although no notice was given, where the leakage was caused by their having permitted a third party to use the roof for purposes to which it was not adapted, thereby rendering it leaky and unsafe, to the knowledge of the lessors. *Pratt, Hurst & Co. v. Tailor.* 417

2. *Covenant for Renewal.* Where under the provisions of a lease for a term of years the lessee agreed within two years to make certain improvements to the leased property which when made were to belong

LEASE — *Continued.*

to the premises, or in lieu thereof to erect a new building in place of the old, the said lessee to be entitled upon performance of the covenants and agreements contained in the lease to a renewal thereof at its expiration, said renewal to contain a covenant that "in case there shall be standing on the premises a * * * building erected by the" lessee, then the lessors or their successors at the expiration of the second lease would, at their option, either purchase the building at a valuation to be ascertained or grant a new lease for a third term for a specified rental, the said lessee, who elected to make the improvements specified rather than erect a new building and who has otherwise performed all of the conditions of the first lease, cannot be required at its expiration to accept a renewal from which the covenant for a third renewal is omitted, upon the theory that it was not intended to be operative unless the lessee had erected a new building upon the premises within the first two years of the original term, but is entitled to have such covenant included. *Martin v. Babcock & Wilcox Co.* 431

For mining coal — agreement by lessee to pay fixed royalty on coal of designated size and quality — when lessor is entitled to royalty on coal of inferior size and quality.

See CONTRACT, 9.

LEGACIES.

When legacy passes to issue of deceased legatee and not to his devisees.

See WILL, 1-3.

LEGISLATURE.

Apportionment of state by.

See APPEAL, 1.

Power of, to provide for appointment of state superintendent of elections by governor.

See CONSTITUTIONAL LAW, 1, 2.

LIBEL.

1. *When Corporation May Maintain Action for Libel.* A corporation, like a natural person, has the right to maintain an action of libel when the publication assails its management or credit and inflicts injury upon its business or property, and an averment of specific damage is not necessary when the language is of so defamatory a nature as to directly affect credit and to occasion pecuniary injury. *Reporters' Assn. v. Sun P. & P. Assn.* 437

2. *Same — When Alleged Libellous Statements Are Not Libellous Per Se.* Where it is stated in a newspaper article that a domestic corporation, engaged in the collection and distribution of news items and the publication of a magazine, has exchanged subscription lists with other concerns organized for the same purpose because the canvassers have always seemed to hit on the same easy marks and that the concerns are "beggars" for subscriptions and aid each other in soliciting them through the exchange of lists which show what persons have been successfully approached by each, such statements are not libellous *per se*, and they are not made such because the same article charged that persons connected with another news and magazine company were "grafters" and had "police records," where there is no other association of the plaintiff with the latter company, nor other implication of similarity in practices and police repute, than what may be found from both having been spoken of in the course of the same article. *Id.*

3. *Pleading — Insufficient Allegation of Special Damage Caused by Alleged Libel.* An allegation of a complaint in an action brought by a

LIBEL—Continued.

corporation, engaged in the collection and distribution of news and the publication of a magazine, against a newspaper for the publication of an alleged libel, that such publication "has caused to this plaintiff a serious loss in business, the refusal by clients to pay the just claims due by contract, and has greatly damaged the plaintiff in credit and reputation." is insufficient as an allegation of special damage in that it fails to state such damage with such particularity that the defendant may be enabled to meet the charge, and the complaint is demurrable, therefore, upon the ground that it fails to state facts sufficient to constitute a cause of action. *Id.*

See Nunnally v. New Yorker Staats-Zeitung (Mem), 532; *Nunnally v. Tribune Assn.* (Mem), 533; *Wilson v. Mandeville* (Mem),

604.

LIENS.

Mechanic's Lien—Insufficient Notice of Lien. A notice that a lien is claimed on the property described therein for \$5,589.60, "being the value and agreed price of certain materials furnished and to be furnished, to wit: Timber, lumber," etc., is fatally defective under the Mechanics' Lien Law, in that it fails to state explicitly or by plain inference the value or the agreed price of the labor performed or materials furnished at the time of the filing thereof. *Finn v. Smith.* 465

Erroneous enforcement of attorney's lien.

See ATTORNEY AND CLIENT.

Mechanic's—failure to comply with specifications of contract.

See CONTRACT, 8.

Vendor's lien.

See VENDOR AND PURCHASER.

LIMITATION OF ACTIONS.

Section 396 of the Code of Civil Procedure Not Affected by Chapter 572 of the Laws of 1886—*Infancy.* Chapter 572 of the Laws of 1886, providing in substance that no action for negligence can be maintained against a municipality having 50,000 inhabitants or over, "unless the same shall be commenced within one year after the cause of action therefor shall have accrued," while it created a special limitation in respect to actions for personal injuries against a particular class of defendants, left that special limitation, like the general limitation prescribed in chapter 4 of the Code of Civil Procedure, subject to suspension during the existence of any of the disabilities specified in section 396, one of which is infancy. *McKnight v. City of New York.* 35

Limitation of time to commence proceeding against city of New York not applicable to proceeding to restore a member of the police force to active duty.

See NEW YORK (CITY OF), 4.

LOCAL OPTION.

See Matter of Webster (Mem.), 536.

MAGISTRATES.

When justice of peace liable for false imprisonment.

See FALSE IMPRISONMENT, 2.

MALICIOUS PROSECUTION.

See Lawrence v. McKelvey (Mem.), 538.

MANDAMUS.

See Matter of Gibbs (Mem.), 513.

Peremptory writ of.

See APPEAL, 3.

MARINE COURT.

Judgment of — change in name of court.

See JUDGMENT, 2.

MASTER AND SERVANT.

Action for personal injuries.

See EVIDENCE, 1.

Action to recover for injuries to servant.

See NEGLIGENCE, 2.

MECHANIC'S LIEN.

See Neubrech v. Lawrence (Mem.), 557; Martin v. Gavigan (Mem.), 559; Easthampton L. & C. Co. v. Worthington (Mem.), 581; Brandt v. City of New York (Mem.), 599.

Failure to comply with specifications of contract.

See CONTRACT, 8.

Insufficient notice of lien.

See LIENS.

MORTGAGE.

Foreclosure — What Constitutes Waiver of Payment of Interest on Corporate Bonds — When Such Waiver Precludes Action to Foreclose Trust Mortgage for Non-payment of Interest on Bonds. Where it appears from uncontradicted evidence, upon the trial of an action to foreclose a trust mortgage given to secure the payment of the bonds of a domestic corporation and the interest thereon, that the holder of a majority of the bonds in value had consented, either before or when the time for the payment of the interest coupons arrived, to extend the time of such payment for a period which was not definitely fixed, such bondholder thereby waived strict payment of the interest, and is thereby precluded from insisting that a default had occurred under a clause in the mortgage providing that in case of any default in the payment of interest upon the bonds, or any of them, and the continuance of such default for six months, and if the holders of one-half in value of the outstanding bonds shall so elect and notify the trustee in writing of such election, the whole of such bonds shall become immediately due and payable, although the period limited in the bonds for the payment thereof shall not have expired; such waiver constitutes an insuperable obstacle to the maintenance of an action to foreclose the mortgage securing such bonds upon the demand of the bondholder making such waiver. *Arnot v. Union Salt Co.* 501

See Preston v. Brinley (Mem.), 515; Allen v. Pierson (Mem.), 546; Barnes v. Howell (Mem.) 550; Lautz v. Williams (Mem.), 551; Willard v. Welch (Mem.), 564.

Bonds — guaranty of security.

See BONDS.

Foreclosure by assignee thereof — when one of two defendants may set off counterclaim against plaintiff's assignor.

See SET-OFF, 2.

MUNICIPAL CORPORATIONS.

Limitation of time in which action for negligence against, can be brought.

See LIMITATION OF ACTIONS.

MUNICIPAL CORPORATIONS — *Continued.*

When village not liable for injuries arising from slight defect in sidewalk.

See NEGLIGENCE, 4.

Taking of lands owned by city for street purposes — when city entitled to compensation.

See NEW YORK (CITY OF), 1, 3.

Obligation of street surface railroad to lay new pavement between its tracks.

See RAILROADS, 1, 2.

NEGLIGENCE

1. *Contributory.* The facts examined in an action to recover damages for injuries sustained by the plaintiff while attempting to cross the railroad track of defendant, and *held*, that they not only failed to establish her freedom from contributory negligence, but demonstrated its existence as a matter of law. *Cranch v. Brooklyn H. R. R. Co.* 810

2. *Master and Servant.* The facts examined in an action to recover for injuries to plaintiff resulting from the defective condition of a blast furnace at which plaintiff was employed, by reason of which a much larger quantity of gas was allowed to escape than would have escaped if the furnace had been kept in good repair, whereby the plaintiff was made unconscious, and, falling into the hopper of the furnace, received severe burns and injuries, and *held* that the evidence was sufficient to sustain a verdict for plaintiff. *Stenger v. Buffalo Union F. Co.* 323

3. *Street Surface Railroad Operated by Trolley System — When Railroad Company Not Liable to Passenger Injured by Trolley Pole While Passing Along Running Board of Open Car.* Where the road, tracks, poles and cars of a street surface railroad, operated by electricity by an overhead or trolley system, were in proper shape and condition and the trolley poles were located at such a distance from the tracks that they were unlikely to endanger passengers of normal size making the ordinary and customary use of the running boards of open cars, the railroad company is not liable for injuries sustained by a passenger of unusually large size from being struck by a trolley pole while he was attempting to pass along the running board of a moving car from the rear end to a seat nearer the front merely because the conductor, when told by the passenger that he intended to change his seat, assented thereto; a contention that the conductor was chargeable with knowledge of the position of the poles, the construction of the car, the size of the plaintiff and was, therefore, negligent in assenting to the act of the passenger, in leaving his place on the rear of the car to go in front without giving him some warning or intimation of the danger involved in such a movement is not tenable, where there is no evidence that the conductor knew that the passenger was not acquainted with the conditions surrounding him and it was entirely possible by the exercise of care for the passenger to have changed his seat as he desired by proceeding along the running board on the other side of the car or by waiting until the car was between two of the trolley poles, when he would incur no danger; and where there appears to have been nothing in the expression of his intention to make the change which would necessarily indicate to the conductor that he proposed to attempt it at the precise time when he did. *Tietz v. International Ry. Co.* 347

4. *When Village Not Liable for Permitting Slight Defect in Sidewalk* Where it appears, that at the junction of a stone and dirt sidewalk in an incorporated village, the surface of the former walk was higher than that of the latter by about two and one-half inches in the center and by about five inches at the edge of the walk, it must be *held* that this was

NEGLIGENCE — *Continued.*

too slight a defect to sustain an action against the village for negligence in behalf of a traveler who had stumbled over the projecting edge and was injured. *Butler v. Village of Oxford.* 444

See Cousino v. Watertown Paper Co. (Mem.), 513; Shane v. Nat. Biscuit Co. (Mem.), 514; Hood v. Lehigh Valley R. R. Co. (Mem.), 517; Maldoon v. Jefferson Power Co. (Mem.), 518; Russell v. N. Y. C. & H. R. R. Co. (Mem.), 519; Cholet v. City of Syracuse (Mem.), 520; Horning v. H. R. Telephone Co. (Mem.), 552; Svenson v. Wilson & Baillie Mfg. Co. (Mem.), 555; Kremer v. N. Y. Edison Co. (Mem.) 557; Pluckman v. American Bridge Co. (Mem.), 561; Serriss v. International Paper Co. (Mem.) 562; Mengle v. M. M. Construction Co. (Mem.), 564; Kuehn v. Syracuse R. T. Ry. Co. (Mem.), 567; Turck v. Robinson (Mem.), 571; Peters v. Slatery (Mem.), 574; Bronk v. Binghamton R. R. Co. (Mem.), 576; Motzing v. E. B. Co. (Mem.), 577; Jacobs v. N. Y. C. & H. R. R. Co. (Mem.), 586; Anglin v. Am. C. & T. Co. (Mem.), 590; Starkweather v. Sundstrom (Mem.), 591; Keefe v. N. Y. C. & H. R. R. Co. (Mem.), 594; Donohue v. Am. Bridge Co. (Mem.), 609; Burger v. Snare & Triest Co. (Mem.), 610; Rogers v. City of Rome (Mem.), 610.

Loss of baggage.

See CARRIERS.

Measure of damages.

See DAMAGES.

Master and servant — action for personal injuries.

See EVIDENCE, 1.

Injury to spectator during speed contest of automobiles on public highway.

See HIGHWAYS, 1, 2.

NEGOTIABLE INSTRUMENTS.

When evidence of sufficient funds to pay promissory note deposited by maker with payee, immaterial — liability of indorser to payee.

See BILLS, NOTES AND CHECKS, 1, 2.

NEWSPAPERS.

When alleged libellous statements are not libellous *per se* — insufficient allegation of special damage.

See LIBEL, 1-3.

NEW YORK (CITY OF).

1. *Taking of Lands Owned by City for Water Pipe Lines for Street Purposes.* Where the board of street opening and improvement of the city of New York, acting under the authority of section 970 of the charter, adopted a resolution requesting the counsel to the corporation to acquire title "wherever the same has not been heretofore acquired for the use of the public to the lands, tenements and hereditaments that shall or may be required for the purpose of opening and extending Van Cortlandt Avenue" between points therein named, and directed "That the entire costs and expense of such proceedings shall be assessed upon the property deemed to be benefited thereby," the commissioners of estimate and apportionment, duly appointed to ascertain and determine the compensation to be made to the respective owners of the land to be taken, and to assess the cost of the improvement upon the persons and property deemed to be benefited thereby, as provided by section 980 of the charter, are justified in including in their award of damages an amount allowed to the city of New York for the loss and damage sustained by it by the opening and extension of said avenue over certain parcels of land previously acquired and purchased by the city in fee simple absolute for the purpose of laying and maintaining thereunder water pipe lines for the city water

NEW YORK (CITY OF)—*Continued.*

supply, said parcels of land having been paid for from the proceeds of bonds issued for that purpose and payable by general taxation. *Matter of Mayor, etc., of New York.* 237

2. *Same*—*When City Entitled to Compensation for Lands so Taken.* The lands belonging to the city for its water pipe lines and taken under the resolution opening and extending Van Cortlandt avenue, were never acquired for street purposes, but the language of that resolution has special reference to the opening and extension of that avenue, and should be construed not only with reference to that purpose but also with reference to section 995 of the charter providing that when any property belonging to the city of New York be required for the opening or extension of streets or shall be benefited thereby "the city shall be entitled to compensation and recompense for the loss and damage it may sustain, and shall be bound to allow and pay for the benefit and advantage it may be deemed to acquire thereby, in like manner as other owners and proprietors of lands and premises required for the purpose of making the said * * * improvement, or deemed to be benefited thereby;" and so construed it must be held that it was not the intention of the board of street opening and improvement, by their resolution, to except from the lands to be acquired that part thereof that had already been acquired by the city for the purposes of the water supply. *Id.*

3. *Same*—*Dedication of Lands Owned by the City, for Other Purposes, for Street Improvements*—*Purpose and Effect of Section 995 of the City Charter.* Where real property has been acquired by the city of New York for general corporate purposes and paid for by general tax, the taking thereof for street purposes, by which the owners of abutting lands are benefited to the extent of the cost of the improvement, would result in a benefit to the abutting owners at the expense of the general taxpayer unless compensation could be allowed to the city for its lands so taken, since the proceeding, so far as the city is concerned as the owner in fee of the lands in question, results in a dedication of such lands for street purposes, and section 995 of the city charter was enacted for the express purpose of adjusting the rights and equities between abutting owners and the general taxpayer so that the city should receive compensation for its loss and damage in such cases "in like manner as other owners and proprietors of lands and premises required for the purpose of making the said * * * improvement." *Id.*

4. *Police Department.* The limitation on the time to commence a proceeding contained in section 302 of the charter of the city of New York (L. 1901, ch. 466) does not apply to a proceeding to restore to active duty a member of the police force who has been retired on account of alleged physical incapacity. *People ex rel. Hurlbut v. Bingham.* 538

Liability for injury to spectator during speed contest of automobiles on public highway.

See HIGHWAYS, 1, 2.

Marine Court—change in name.

See JUDGMENT, 2.

Enforcement of act regulating price of gas in.

See JURISDICTION.

Limitation of time in which action for negligence against, must be brought—suspension during infancy.

See LIMITATION OF ACTIONS.

Obligation of street surface railroad to lay new pavement between its tracks.

See RAILROADS, 1, 2.

NOMINATIONS.

Independent—validity of certificate.

See ELECTIONS, 1-3.

NOTES.

Promissory—when evidence of sufficient funds to pay note deposited by maker with payee, immaterial—liability of indorser to payee.

See BILLS, NOTES AND CHECKS, 1, 2.

NOTICE.

Of lien—insufficiency.

See LIENS.

NUISANCE.

Speed contest of automobiles on public highway.

See HIGHWAYS, 1, 2.

OFFICERS.

1. *Public Officers—Unauthorized Acts of State Engineer in Making a State Survey, When a Trespass.* Where the agents of the state, for the purpose of establishing a boundary line between counties, enter upon private land, without statutory authority and without the consent of the owner, and appropriate a strip of land three and a quarter miles in length and several feet wide, fell trees thereon and otherwise damage the property, such acts constitute a trespass for which said agents are individually liable. While the state has the right to enter upon private lands for the purpose of surveying and locating boundary lines, its agents exceed their lawful powers when, without provision for compensation, they inflict substantial and permanent damages upon such property in locating a permanent base line, although the work is done with due care and skill. *Litchfield v. Bond.* 66

2. *Exercise of Police Power Not Warranted.* In the absence of any overwhelming necessity or emergency requiring immediate action, the police power cannot be properly invoked to justify such action. *Id.*

3. *Exercise of Power of Eminent Domain Not Authorized by Statute Directing Survey.* Nor does a statute (L. 1902, ch. 478) directing the state engineer to "locate, establish and permanently mark upon the ground" the boundary line in dispute and appropriating \$40,000 for the purposes of the act, authorize him, as an agent of the state, to exercise the power of eminent domain in order to effect the purpose of the act, in the absence of any indication of an intent to confer such power and of any provision for compensation for private property to be taken and destroyed. *Id.*

4. *Subsequent Statute Ineffective as a Ratification by the State.* Nor does a statute (L. 1903, ch. 348) enacted subsequently to the trespass, even if authorizing the taking or invasion of private property for public use, afford any protection to the wrongdoers as against the owner where his property has been taken before its passage. *Id.*

5. *General Power of the State to Make a Survey Insufficient as a Justification.* Nor can the trespass be justified as having been committed in the exercise of the general and inherent power of the state in making a survey for the establishment of disputed boundary lines between counties; while the state may, through its agents, enter upon and temporarily occupy private lands, or even commit acts thereon that are ordinarily classified as technical trespasses without becoming liable to compensate the injured owner, there is immunity from liability only to the extent that the entry or occupation is temporary, or the infliction of damage is incidental and incipient or preliminary—if the occupation is to be permanent or the damage is to be substantial, then the state and those

OFFICERS — Continued.

assuming to act under it must invoke those powers under which such things may lawfully be done. *Id.*

6. *Constitutional Law — Acts Constituting a Taking of Property.* Such an entry and occupation is a taking of property within the meaning of the State and Federal Constitutions. *Id.*

7. *Remedy of Landowner Not Confined to Court of Claims.* The fact that by an act passed after the commission of the trespass (L. 1904, ch. 561) the Court of Claims was authorized to determine the damages resulting from such trespass, does not relegate the landowner to that court as the only forum in which he can prosecute his claim therefor, where such act expressly disclaims the creation or acknowledgment of any liability upon the part of the state. *Id.*

8. *The State Not Liable for the Tortious Acts of Its Officials.* The state as an entity cannot commit a trespass. It is liable for the tortious acts of its officers or agents only in special instances expressly created by law. When, therefore, public officers assume to act for the state, and although acting in good faith and believing themselves authorized to act for it, take and destroy property without due process of law and just compensation, their acts, being contrary to law, cannot be the acts of the state, but are their individual acts, for which they alone are responsible; and an action is maintainable against them personally to restrain the further commission of such unlawful acts and to recover the damages already accrued. *Id.*

State superintendent of elections — appointment of.

See CONSTITUTIONAL LAW, 1, 2.

Independent nomination of candidates for public office — validity of certificate.

See ELECTIONS, 1-3.

PARENT AND CHILD.

Provision in ante-nuptial contract whereby father of son about to marry agreed to provide equally for all of his children by will — when son may enforce contract.

See CONTRACT, 2, 5.

Right of adopted child to inherit.

See REAL PROPERTY, 1-4.

PARTNERSHIP.

See Culhoun v. Buck (Mem.), 598.

PARTIES.

Receiver in supplementary proceedings not necessary party plaintiff to judgment creditor's action to charge property held under trust.

See TRUST, 1, 2.

PARTITION.

When action of, cannot be maintained — acceptance of benefit under will involves renunciation of rights inconsistent with instrument.

See WILL, 4.

PAYMENT.

See Roach v. City of New York (Mem.), 592.

PLEADING.

See Met. Milk & Cream Co. v. City of New York (Mem.), 588.

Insufficient allegation of special damage caused by alleged libel.

See LIBEL, 3.

PLEADING — *Continued*

When complaint in action by riparian owner to restrain pollution of stream not demurrable.

See **RIPARIAN RIGHTS**, 2.

When failure to reply does not preclude plaintiff from contesting counterclaim.

See **SET-OFF**, 1.

POLICE.

See *People ex rel. Kenny v. Bingham* (Mem.), 522; *People ex rel. Rear-don v. Bingham* (Mem.), 522; *People ex rel. Hurlbut v. Bingham* (Mem.), 523; *Matter of O'Rourke* (Mem.), 535; *People ex rel. Rear-don v. Bingham* (Mem.), 539; *People ex rel. Kenny v. Bingham* (Mem.), 539; *People ex rel. Walters v. Lewis* (Mem.), 538.

Limitation of time to commence proceeding against city of New York not applicable to proceeding to restore a member of the police force to active duty.

See **NEW YORK (CITY OF)**, 4.

POLICE POWER.

When exercise of, not warranted.

See **OFFICERS**, 2.

PRINCIPAL AND AGENT.

1. *Fraud of Principal a Defense to Action by Agent to Recover Purchase Price of Stock Sold.* A defense that the owner of stock induced its sale by fraud is available to the purchaser in an action to recover the purchase price, brought by the broker who made the sale, since the relationship existing between a Stock Exchange broker and a customer is not so peculiar as to exempt it from the ordinary principles and rules of agency. *Leo v. McCormack.* 830

2. *When Principal's Fraud No Bar to Recovery of Amount Advanced Him by Broker on Stock Sold.* Where, however, the stock sold was held on margin, the broker has a lien thereon to the amount of his advances, and if not a party thereto, his principal's fraud is no bar to a recovery of such amount. *Id.*

See *Birkett v. Postal Tel. Cable Co.* (Mem.), 591.

PRINCIPAL AND SURETY.

See *Doon v. American Surety Co.* (Mem.), 598.

PROHIBITION.

Writ of — remedy of person served with void subpoena is by writ of habeas corpus, not by writ of prohibition.

See **CRIMES**, 7-11.

RAILROADS.

1. *Street Surface Railroads — Provision of Statute Incorporating Street Surface Railroad Company, to Keep Pavement Between Its Tracks in Good Repair — When Applicable to Extension of Railroad Constructed under Subsequent Statute.* Where a street surface railroad company was incorporated to build and operate a street surface railroad in and upon streets now within the city of New York under a special statute (L. 1863, ch. 361), to which was added, by a subsequent amendment (L. 1871, ch. 658), a provision requiring the company and its successors to "keep the surface of the street inside its rails and for one foot outside thereof in good and proper order and repair," and the company extended its lines over roads and streets, not named in its charter, under the authority of a subsequent act (L. 1874, ch. 553), amending the original act of incorporation, the company is compelled, upon the requirement of the authorities of the city, to lay a new granite block pavement between and for

RAILROADS — *Continued.*

one foot outside the rails of its tracks to conform with a new granite pavement laid by the city in the streets in which the extended lines are situated, although the statute authorizing the extension is silent upon the subject of repairs or repaving, since the authority to construct such extension was subject to the obligations contained in the original act of incorporation as amended. *Mayor, etc., of New York v. H. B., M. & F. R. Co.* 304

2. *Same* — *Obligation of Street Surface Railroad Company to Lay New Pavement Between Its Tracks at Demand of Municipality.* Where the statute under which a street surface railroad company was incorporated contains a provision requiring the company to "keep the surface of the street inside the rails and for one foot outside thereof in good and proper order and repair," the question of what shall constitute keeping the pavement in good order and repair should be determined, somewhat at least, with reference to existing and surrounding conditions; and where a municipality has for sufficient reason decided to pave a street with a new and better pavement, it is the duty of the railroad company to co-operate with the city and put its part of the street in the same condition as the remainder thereof, even though that necessitates the laying of a new pavement as distinguished from repairing an old one. *Id.*

See People ex rel. City of Geneva v. Geneva, etc., Traction Co. (Mem.), 516.

Action against, for negligence.

See NEGLIGENCE, 1.

When company not liable to passengers injured by trolley pole near track.

See NEGLIGENCE, 3.

RAPE.

See People v. Munnasovitch (Mem.), 592.

REAL PROPERTY.

1. *Trust Deed Conveying Life Estate with Remainder to Heirs of Beneficiary.* Land conveyed to a trustee in trust for the use and benefit of a designated beneficiary during her natural life and after her decease to her heirs at law passes to the person who is her heir at law at the date of her death, and not to those who were her heirs at law at the time of the execution and delivery of the trust deed. *Gilliam v. Guaranty Trust Co.* 127

2. *Same* — *When Adopted Child Takes Property upon Death of Beneficiary.* Where the *cestui que trust*, named in such trust deed, and her husband duly adopted, in 1883, pursuant to the provisions of the statute then in force (L. 1873, ch. 830), an infant as and for their lawful child, and thereafter they and such child sustained towards each other the mutually acknowledged relation of parent and child, and the *cestui que trust*, thereafter and subsequent to the death of her husband, died leaving her surviving no issue or descendants of any issue, such adopted child is her heir at law within the meaning of the deed of trust, and the property passes to such child rather than to the brothers of the deceased *cestui que trust*, who were her heirs at law at the time of the execution and delivery of the trust deed. *Id.*

3. *Same* — *Rights of Adopted Child.* Although the statute (L. 1873, ch. 830), under which such child was adopted, excluded adopted children from any right of inheritance, such child is entitled to the benefit of the statute (L. 1896, ch. 272, § 64, as amd. by L. 1897, ch. 408, § 64), enacted subsequent to the adoption, conferring the right of inheritance upon adopted children, and thereby became the heir at law of the *cestui que trust* and upon her death entitled to the trust property under the deed of

REAL PROPERTY — Continued.

trust; the brothers of the *cestui que trust*, who were living at the time of the execution of the trust deed, in 1853, and at the time of her death, did not by such relationship acquire any vested right during the life of their sister to the continuance of such heirship since the legislature had the power to change this right and provide for a different line of inheritance. *Id.*

4. *Same — Construction of Statutes Relating to Rights of Inheritance of Adopted Child.* The provisions of the statute (L. 1896, ch. 272, § 60) that "Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June 25, 1873, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created," have no application to the trust in question, although the trust deed was executed and delivered in 1853. It was not created by will or any testamentary provision, and is not a trust within the meaning of such statute; the only trust created was for the use and benefit of the *cestui que trust* named in the trust deed during her natural life, and after her decease to her heirs at law; the purpose of the trust and the functions of the trustee were all accomplished and discharged when the *cestui que trust* died, and after that event the property passed without the aid of any trust to her heirs; that is, to the persons whom the law should designate as her heirs when the time arrived. *Id.*

5. *Ejectment — Occupation by Telephone Wire of Space Above Land.* An action of ejectment will lie where the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant above the plaintiff's premises; the disseizin of the owner is measured by the extent of the space occupied and the sheriff can physically remove the wire and thereby restore the plaintiff to possession. *Butler v. Frontier Telephone Co.* 486

See Gehrhardt v. Schwartz (Mem.), 574; *Conger v. Ensler* (Mem.), 588; *Flagler v. Berlin* (Mem.), 589; *Weddigan v. Whiting* (Mem.), 596; *Tittle v. Van Valkenburg* (Mem.), 597; *Smith v. Marsh* (Mem.), 605.

Indian lands — when occupant of lands may maintain action of ejectment against telephone company erecting poles and wires on his lands.

See INDIANS, 1, 2.

Liability of landlord for damages caused by third party.

See LEASE, 1.

Covenant for renewal of lease.

See LEASE, 2.

Insufficient notice of lien.

See LIENS.

When lower riparian owner may maintain action against a number of upper riparian owners to restrain them all, although acting separately, from polluting the waters of a stream.

See RIPARIAN RIGHTS, 1, 2.

Vendor's lien — property contracted to be sold subject to mortgages for certain amount but conveyed subject to mortgages for less amount — When vendor's lien may be enforced for difference in amount.

See VENDOR AND PURCHASER.

Devise — when acceptance of benefit under will involves renunciation of rights inconsistent with instrument.

See WILL, 4.

REMEDIES.

Premature action to recover damages for the repudiation by a mutual life insurance company of its obligation under a policy — remedy in equity.

See INSURANCE, 1, 2.

RIPARIAN RIGHTS.

1. *When Lower Riparian Owner May Maintain Action Against a Number of Upper Riparian Owners to Restrain Them All, Although Acting Separately, from Polluting the Waters of a Stream.* The owner of land abutting upon a canal, maintained from time immemorial for the purpose of leading the greater part of the waters of a stream to certain large mills, there to be used for power, may maintain an action in equity to restrain a number of corporations and persons, some sued simply as individuals and some as members of copartnerships, doing business on premises abutting upon the upper waters of the stream, from discharging tannery and factory refuse and other filthy substances into the stream, thereby polluting the waters and bed and banks of the stream and occasioning offensive deposits in the canal and upon the land of the plaintiff, whereby the comfort of the plaintiff and his tenants was destroyed, the premises rendered unhealthful and the value thereof diminished. *Warren v. Parkhurst.* 45

2. *Pleading — When Complaint in Such Action Not Demurrable.* The complaint in such action, considered as a bill in equity to restrain the further pollution of the stream by the defendant, is not demurrable upon the grounds: (1) "That it fails to state facts sufficient to constitute a cause of action" in that "The damages suffered by the plaintiff from the pollution of the stream by any one defendant, if there were no other sources of pollution, would be nominal;" and (2) upon the ground of "multifariousness, in that it commingles and blends certain alleged causes of action against certain defendants separately, which are not good against them jointly and do not affect all the defendants," where it is alleged that the injury suffered by plaintiff arises from the concurring and continuous trespass and wrongdoing of all the defendants, and that, if continued, the acts of the defendants will constitute a permanent nuisance and an irreparable injury to the premises and property rights of the plaintiff; since the acts of the defendants may be independent and several, but the results of these several acts combine to produce whatever damage or injury the plaintiff suffers, and in equity constitute but one cause of action. *Id.*

SALE.

See *Michigan Sav. Bank v. Miliar* (Mem.), 606; *Michigan Sav. Bank v. Coy. Hunt & Co.* (Mem.), 607; *Michigan Sav. Bank v. Hubbs* (Mem.), 607.

Specific enforcement of contract of.

See CONTRACT, 1.

Of machine — parol evidence of express warranty.

See EVIDENCE, 2.

SERVICES.

Attorney's lien for — erroneous enforcement.

See ATTORNEY AND CLIENT.

Of canal boat and crew — breach of contract for.

See CONTRACT, 7.

SESSION LAWS.

1. 1863, Ch. 361, *Street Surface Railroads — Provision of Statute Incorporating Street Surface Railroad Company, to Keep Pavement Between Its Tracks in Good Repair — When Applicable to Extension of Railroad Constructed Under Subsequent Statute.* Where a street surface railroad company was incorporated to build and operate a street surface railroad in

SESSION LAWS — Continued.

and upon streets now within the city of New York under a special statute (L. 1863, ch. 361), to which was added, by a subsequent amendment (L. 1871, ch. 658), a provision requiring the company and its successors to "keep the surface of the street inside its rails and for one foot outside thereof in good and proper order and repair," and the company extended its lines over roads and streets, not named in its charter, under the authority of a subsequent act (L. 1874, ch. 553), amending the original act of incorporation, the company is compelled, upon the requirement of the authorities of the city, to lay a new granite block pavement between and for one foot outside the rails of its tracks to conform with a new granite pavement laid by the city in the streets in which the extended lines are situated, although the statute authorizing the extension is silent upon the subject of repairs or repaving, since the authority to construct such extension was subject to the obligations contained in the original act of incorporation as amended. *Mayor, etc., N. Y. v. H. B., M. & F. Ry. Co.* 304 1871, Ch. 658. See par. 1, this title.

3. 1873, Ch. 680 — *When Adopted Child Takes Property upon Death of Beneficiary.* Where the *cestui que trust*, named in a trust deed, and her husband duly adopted, in 1868, pursuant to the provisions of the statute then in force (L. 1873, ch. 830), an infant as and for their lawful child, and thereafter they and such child sustained toward each other the mutually acknowledged relation of parent and child, and the *cestui que trust*, thereafter and subsequent to the death of her husband, died leaving her surviving no issue or descendants of any issue, such adopted child is her heir at law within the meaning of the deed of trust, and the property passes to such child rather than to the brothers of the deceased *cestui que trust*, who were her heirs at law at the time of the execution and delivery of the trust deed. *Gilliam v. Guaranty Trust Co.* 137

3. *Idem* — *Rights of Adopted Child.* Although the statute (L. 1873, ch. 830), under which such child was adopted, excluded adopted children from any right of inheritance, such child is entitled to the benefit of the statute (L. 1896, ch. 272, § 64, as amd. by L. 1897, ch. 408, § 64), enacted subsequent to the adoption, conferring the right of inheritance upon adopted children, and thereby became the heir at law of the *cestui que trust* and upon her death entitled to the trust property under the deed of trust; the brothers of the *cestui que trust*, who were living at the time of the execution of the trust deed, in 1853, and at the time of her death, did not by such relationship acquire any vested right during the life of their sister to the continuance of such heirship since the legislature had the power to change this right and provide for a different line of inheritance. *Id.*

4. *Idem* — *Construction of Statutes Relating to Rights of Inheritance of Adopted Child.* The provisions of the statute (L. 1896, ch. 272, § 60) that "Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June 25, 1873, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created," have no application to the trust in question, although the trust deed was executed and delivered in 1853. It was not created by will or any testamentary provision, and is not a trust within the meaning of such statute; the only trust created was for the use and benefit of the *cestui que trust* named in the trust deed during her natural life, and after her decease to her heirs at law; the purpose of the trust and the functions of the trustee were all accomplished and discharged when the *cestui que trust* died, and after that event the property passed without the aid of any trust to her heirs; that is, to the persons whom the law should designate as her heirs when the time arrived. *Id.*

1874, Ch. 553. See par. 1, this title.

SESSION LAWS — *Continued.*

5. 1883, *Ch. 26* — *New York (City of) — Marine Court — Change in Name.* The statute (L. 1883, ch. 26) providing that on and after the 1st day of July, 1883, the Marine Court of the city of New York, established as a court of record in 1876, should be designated as the City Court of New York, merely changed the name of the court and had no effect upon proceedings past or pending; and a judgment obtained in the Marine Court and docketed in New York county on the 8d day of November, 1881, is not the judgment of an "extinct court," but may be enforced like any other judgment of a court of record. *Peace v. Wilson.* 403

6. 1886, *Ch. 572* — *Section 396 of the Code of Civil Procedure Not Affected by — Infancy.* Chapter 572 of the Laws of 1886, providing in substance that no action for negligence can be maintained against a municipality having 50,000 inhabitants or over, "unless the same shall be commenced within one year after the cause of action therefor shall have accrued," while it created a special limitation in respect to actions for personal injuries against a particular class of defendants, left that special limitation, like the general limitation prescribed in chapter 4 of the Code of Civil Procedure, subject to suspension during the existence of any of the disabilities specified in section 396, one of which is infancy. *McKnight v. City of New York.* 35

7. 1890, *Ch. 534* — *Stock Corporation Law — Reduction of Number of Directors.* A resolution to reduce the number of directors of a stock corporation under section 21 of the Stock Corporation Law (L. 1890, ch. 534; amd. L. 1905, ch. 750) does not take effect until the date of the filing in the proper offices of the transcript of the proceedings of the meeting at which the resolution was adopted; the simple adoption of the resolution is insufficient to reduce the number of directors; nor does a subsequent filing relate back so as to give effect to a resolution not operative of itself. *Matter of Westchester Trust Co.* 215

8. 1892, *Ch. 679* — *Indian Law — When Lands Occupied by Members of Nation Deemed to Have Been Allotted Under the Indian Law — When Occupant of Lands May Maintain Action of Ejectment Against Telephone Company Erecting Poles and Wires on Its Lands.* Where a member of the Tonawanda Nation of Seneca Indians has occupied and been in undisputed possession of lands within the reservation, purchased by his mother from the chiefs of the nation in 1859, for a period of more than twenty-two years, the presumption that such occupant holds the lands under an allotment within the meaning of section 56 of the Indian Law (L. 1892, ch. 679, § 56) is controlling, and he must be deemed to be the owner in fee, having the full Indian title, as a member of the Tonawanda Nation of Seneca Indians, to the land in question, subject to the easement of the public, for the purposes of travel in a highway running through such lands; and as such owner in fee is entitled to maintain an action of ejectment against a telephone company which has erected telephone poles and stretched wires upon his lands along the highway without his consent, notwithstanding the fact that the company has obtained permission from the council of the nation to erect such poles and wires across the lands of the reservation. *Jenison v. Bell Telephone Co.* 493

See, also, par. 21, this title.

1896, *Ch. 272.* See pars. 3 and 4, this title.

9. 1896, *Ch. 568* — *Judgments — Actions on Judgments for Money Between Original Parties to the Judgment — Effect of Statute Amending Section 1913 of Code of Civil Procedure.* The statute (L. 1896, ch. 568), which added to section 1913 of the Code of Civil Procedure, relating to actions upon judgments for a sum of money, between the original parties, a provision that such an action can be maintained when "ten years have elapsed since the docketing of such judgment," is retroactive in its application although it contains no affirmative declaration to that effect; and, hence, an

SESSION LAWS — Continued.

action, commenced September 20, 1901, upon a judgment docketed November 3, 1881, may be maintained by the original plaintiffs against the original defendants without alleging compliance with either of the other requirements of section 1913. *Peace v. Wilson.* 403

10. 1896, Ch. 908 — *Tax Law — Transfer Tax — Policy Issued upon Life of Non-resident of State — When Proceeds Thereof Not Subject to Taxation Within This State.* The proceeds of a life insurance policy, issued upon the life of a non-resident by a domestic corporation and payable to the estate of the insured at the principal office of the company within this state, should be regarded as property within the state of decedent's residence rather than property within this state, and, therefore, not subject to a transfer tax under subdivision 3 of section 220 of the Tax Law (L. 1896, ch. 908, § 220), relating to the taxation of property of non-resident decedents within this state; where it appears that the insured was a resident of a foreign state at the time the policy was issued; that the policy had at all times been kept within that state and the premiums paid there; that the insured died there; that his will was admitted to probate and his executors appointed there; that the proofs of death might have been made there, if the policy had not been voluntarily paid; that the company, as a condition of doing business in that state, had designated a certain official thereof to receive service of process with the same effect as if served personally upon the company; and that, at the time of the death of the insured, there was sufficient property of the company within that state to satisfy the policy, so that it would not have been necessary for decedent's executors to come to this state to protect and collect his claim under the policy, if it had not been paid; such circumstances are sufficient to fix the situs of the contract of insurance and the claims arising thereunder in the state of decedent's residence and not within this state. *Matter of Gordon.* 471

11. 1896, Ch. 909 — *Election Law — Certificate for Independent Nomination Valid, Although Made for the Nomination of More Than One Candidate.* When certificates for independent nominations, made and filed under the provisions of the Election Law (L. 1896, ch. 909, §§ 57, 58 and 59), are required to be filed in the same office, one of such certificates is not invalid because made for the nomination of more than one candidate where the electors making it are qualified to make a certificate for the nomination of all of the candidates mentioned therein. *Matter of Independent Nominations.* 266

12. *Idem — Contest Between Several Sets of Local Independence League Nominations — When Certificate First Filed Is Entitled to Preference.* Where there is a contest between several sets of local Independence League nominations the certificate first filed under that title is entitled to preference, provided that, under the provisions of section 56 of the Election Law, it was filed by the same "independent body" which had made the state nominations. Whether the electors who joined in the first certificate or those who made the second certificate were the same "independent body" presents a question of fact on which the Court of Appeals is concluded by the decisions of the courts below. *Id.*

13. 1897, Ch. 378 — *New York City Charter — False Imprisonment — Erroneous Refusal to Charge as to Liability for Arrest.* Where it appears in an action to recover damages for false imprisonment that the person making the arrest was a special patrolman appointed by the police board of the city of New York, at the request of the defendant, under section 308 of the charter (L. 1897, ch. 378), which provided that such patrolman should "possess all the powers and discharge all the duties of the police force applicable to regular patrolmen," but that he should be paid by the party upon whose application he is appointed, and the trial court expressly charges that the acts of the officer in connection with the arrest

MUNICIPAL CORPORATIONS — *Continued.*

When village not liable for injuries arising from slight defect in sidewalk.

See NEGLIGENCE, 4.

Taking of lands owned by city for street purposes — when city entitled to compensation.

See NEW YORK (CITY OF), 1, 3.

Obligation of street surface railroad to lay new pavement between its tracks.

See RAILROADS, 1, 2.

NEGLIGENCE.

1. *Contributory.* The facts examined in an action to recover damages for injuries sustained by the plaintiff while attempting to cross the railroad track of defendant, and *held*, that they not only failed to establish her freedom from contributory negligence, but demonstrated its existence as a matter of law. *Cranck v. Brooklyn H. R. R. Co.* 310

2. *Master and Servant.* The facts examined in an action to recover for injuries to plaintiff resulting from the defective condition of a blast furnace at which plaintiff was employed, by reason of which a much larger quantity of gas was allowed to escape than would have escaped if the furnace had been kept in good repair, whereby the plaintiff was made unconscious, and, falling into the hopper of the furnace, received severe burns and injuries, and *held* that the evidence was sufficient to sustain a verdict for plaintiff. *Stenger v. Buffalo Union F. Co.* 323

3. *Street Surface Railroad Operated by Trolley System — When Railroad Company Not Liable to Passenger Injured by Trolley Pole While Passing Along Running Board of Open Car.* Where the road, tracks, poles and cars of a street surface railroad, operated by electricity by an overhead or trolley system, were in proper shape and condition and the trolley poles were located at such a distance from the tracks that they were unlikely to endanger passengers of normal size making the ordinary and customary use of the running boards of open cars, the railroad company is not liable for injuries sustained by a passenger of unusually large size from being struck by a trolley pole while he was attempting to pass along the running board of a moving car from the rear end to a seat nearer the front merely because the conductor, when told by the passenger that he intended to change his seat, assented thereto; a contention that the conductor was chargeable with knowledge of the position of the poles, the construction of the car, the size of the plaintiff and was, therefore, negligent in assenting to the act of the passenger, in leaving his place on the rear of the car to go in front without giving him some warning or intimation of the danger involved in such a movement is not tenable, where there is no evidence that the conductor knew that the passenger was not acquainted with the conditions surrounding him and it was entirely possible by the exercise of care for the passenger to have changed his seat as he desired by proceeding along the running board on the other side of the car or by waiting until the car was between two of the trolley poles, when he would incur no danger; and where there appears to have been nothing in the expression of his intention to make the change which would necessarily indicate to the conductor that he proposed to attempt it at the precise time when he did. *Tiets v. International Ry. Co.* 347

4. *When Village Not Liable for Permitting Slight Defect in Sidewalk* Where it appears, that at the junction of a stone and dirt sidewalk in an incorporated village, the surface of the former walk was higher than that of the latter by about two and one-half inches in the center and by about five inches at the edge of the walk, it must be *held* that this was

NEGLIGENCE — Continued.

too slight a defect to sustain an action against the village for negligence in behalf of a traveler who had stumbled over the projecting edge and was injured. *Butler v. Village of Oxford*. 444

See Cousino v. Watertown Paper Co. (Mem.), 513; *Shane v. Nat. Biscuit Co.* (Mem.), 514; *Hood v. Lehigh Valley R. R. Co.* (Mem.), 517; *Maldoon v. Jefferson Power Co.* (Mem.), 518; *Russell v. N. Y. C. & H. R. R. Co.* (Mem.), 519; *Cholet v. City of Syracuse* (Mem.), 520; *Horning v. H. R. Telephone Co.* (Mem.), 552; *Swenson v. Wilson & Baillie Mfg. Co.* (Mem.), 555; *Kremer v. N. Y. Edison Co.* (Mem.), 557; *Pluckman v. American Bridge Co.* (Mem.), 561; *Serriss v. International Paper Co.* (Mem.) 562; *Mengle v. M. M. Construction Co.* (Mem.), 564; *Kuehn v. Syracuse R. T. Ry. Co.* (Mem.), 567; *Turck v. Robinson* (Mem.), 571; *Peters v. Slatery* (Mem.), 574; *Bronk v. Binghamton R. R. Co.* (Mem.), 576; *Motzing v. E. B. Co.* (Mem.), 577; *Jacobi v. N. Y. C. & H. R. R. Co.* (Mem.), 586; *Anglin v. Am. C. & T. Co.* (Mem.), 590; *Starkweather v. Sundstrom* (Mem.), 591; *Keeffe v. N. Y. C. & H. R. R. Co.* (Mem.), 594; *Donohue v. Am. Bridge Co.* (Mem.), 609; *Burger v. Snare & Triest Co.* (Mem.), 610; *Rogers v. City of Rome* (Mem.), 610.

Loss of baggage.

See CARRIERS.

Measure of damages.

See DAMAGES.

Master and servant — action for personal injuries.

See EVIDENCE, 1.

Injury to spectator during speed contest of automobiles on public highway.

See HIGHWAYS, 1, 2.

NEGOTIABLE INSTRUMENTS.

When evidence of sufficient funds to pay promissory note deposited by maker with payee, immaterial — liability of indorser to payee.

See BILLS, NOTES AND CHECKS, 1, 2.

NEWSPAPERS.

When alleged libellous statements are not libellous *per se* — insufficient allegation of special damage.

See LIBEL, 1-3.

NEW YORK (CITY OF).

1. *Taking of Lands Owned by City for Water Pipe Lines for Street Purposes.* Where the board of street opening and improvement of the city of New York, acting under the authority of section 970 of the charter, adopted a resolution requesting the counsel to the corporation to acquire title "wherever the same has not been heretofore acquired for the use of the public to the lands, tenements and hereditaments that shall or may be required for the purpose of opening and extending Van Cortlandt Avenue" between points therein named, and directed "That the entire costs and expense of such proceedings shall be assessed upon the property deemed to be benefited thereby," the commissioners of estimate and apportionment, duly appointed to ascertain and determine the compensation to be made to the respective owners of the land to be taken, and to assess the cost of the improvement upon the persons and property deemed to be benefited thereby, as provided by section 980 of the charter, are justified in including in their award of damages an amount allowed to the city of New York for the loss and damage sustained by it by the opening and extension of said avenue over certain parcels of land previously acquired and purchased by the city in fee simple absolute for the purpose of laying and maintaining thereunder water pipe lines for the city water

NEW YORK (CITY OF)—*Continued.*

supply, said parcels of land having been paid for from the proceeds of bonds issued for that purpose and payable by general taxation. *Matter of Mayor, etc., of New York.* 237

2. *Same*—*When City Entitled to Compensation for Lands so Taken.* The lands belonging to the city for its water pipe lines and taken under the resolution opening and extending Van Cortlandt avenue, were never acquired for street purposes, but the language of that resolution has special reference to the opening and extension of that avenue, and should be construed not only with reference to that purpose but also with reference to section 995 of the charter providing that when any property belonging to the city of New York be required for the opening or extension of streets or shall be benefited thereby "the city shall be entitled to compensation and recompense for the loss and damage it may sustain, and shall be bound to allow and pay for the benefit and advantage it may be deemed to acquire thereby, in like manner as other owners and proprietors of lands and premises required for the purpose of making the said * * * improvement, or deemed to be benefited thereby;" and so construed it must be held that it was not the intention of the board of street opening and improvement, by their resolution, to except from the lands to be acquired that part thereof that had already been acquired by the city for the purposes of the water supply. *Id.*

3. *Same*—*Dedication of Lands Owned by the City, for Other Purposes, for Street Improvements—Purpose and Effect of Section 995 of the City Charter.* Where real property has been acquired by the city of New York for general corporate purposes and paid for by general tax, the taking thereof for street purposes, by which the owners of abutting lands are benefited to the extent of the cost of the improvement, would result in a benefit to the abutting owners at the expense of the general taxpayer unless compensation could be allowed to the city for its lands so taken, since the proceeding, so far as the city is concerned as the owner in fee of the lands in question, results in a dedication of such lands for street purposes, and section 995 of the city charter was enacted for the express purpose of adjusting the rights and equities between abutting owners and the general taxpayer so that the city should receive compensation for its loss and damage in such cases "in like manner as other owners and proprietors of lands and premises required for the purpose of making the said * * * improvement." *Id.*

4. *Police Department.* The limitation on the time to commence a proceeding contained in section 303 of the charter of the city of New York (L. 1901, ch. 486) does not apply to a proceeding to restore to active duty a member of the police force who has been retired on account of alleged physical incapacity. *People ex rel. Hurlbut v. Bingham.* 538

Liability for injury to spectator during speed contest of automobiles on public highway.

See HIGHWAYS, 1, 2.

Marine Court—change in name.

See JUDGMENT, 2.

Enforcement of act regulating price of gas in.

See JURISDICTION.

Limitation of time in which action for negligence against, must be brought—suspension during infancy.

See LIMITATION OF ACTIONS.

Obligation of street surface railroad to lay new pavement between its tracks.

See RAILROADS, 1, 2.

NOMINATIONS.

Independent—validity of certificate.

See ELECTIONS, 1-3.

NOTES.

Promissory—when evidence of sufficient funds to pay note deposited by maker with payee, immaterial—liability of indorser to payee.

See BILLS, NOTES AND CHECKS, 1, 2.

NOTICE.

Of lien—insufficiency.

See LIENS.

NUISANCE.

Speed contest of automobiles on public highway.

See HIGHWAYS, 1, 2.

OFFICERS.

1. *Public Officers—Unauthorized Acts of State Engineer in Making a State Survey, When a Trespass.* Where the agents of the state, for the purpose of establishing a boundary line between counties, enter upon private land, without statutory authority and without the consent of the owner, and appropriate a strip of land three and a quarter miles in length and several feet wide, fell trees thereon and otherwise damage the property, such acts constitute a trespass for which said agents are individually liable. While the state has the right to enter upon private lands for the purpose of surveying and locating boundary lines, its agents exceed their lawful powers when, without provision for compensation, they inflict substantial and permanent damages upon such property in locating a permanent base line, although the work is done with due care and skill. *Litchfield v. Bond.* 66

2. *Exercise of Police Power Not Warranted.* In the absence of any overwhelming necessity or emergency requiring immediate action, the police power cannot be properly invoked to justify such action. *Id.*

3. *Exercise of Power of Eminent Domain Not Authorized by Statute Directing Survey.* Nor does a statute (L. 1902, ch. 478) directing the state engineer to "locate, establish and permanently mark upon the ground" the boundary line in dispute and appropriating \$40,000 for the purposes of the act, authorize him, as an agent of the state, to exercise the power of eminent domain in order to effect the purpose of the act, in the absence of any indication of an intent to confer such power and of any provision for compensation for private property to be taken and destroyed. *Id.*

4. *Subsequent Statute Ineffective as a Ratification by the State.* Nor does a statute (L. 1903, ch. 348) enacted subsequently to the trespass, even if authorizing the taking or invasion of private property for public use, afford any protection to the wrongdoers as against the owner where his property has been taken before its passage. *Id.*

5. *General Power of the State to Make a Survey Insufficient as a Justification.* Nor can the trespass be justified as having been committed in the exercise of the general and inherent power of the state in making a survey for the establishment of disputed boundary lines between counties; while the state may, through its agents, enter upon and temporarily occupy private lands, or even commit acts thereon that are ordinarily classified as technical trespasses without becoming liable to compensate the injured owner, there is immunity from liability only to the extent that the entry or occupation is temporary, or the infliction of damage is incidental and incipient or preliminary—if the occupation is to be permanent or the damage is to be substantial, then the state and those

OFFICERS — Continued.

assuming to act under it must invoke those powers under which such things may lawfully be done. *Id.*

6. *Constitutional Law — Acts Constituting a Taking of Property.* Such an entry and occupation is a taking of property within the meaning of the State and Federal Constitutions. *Id.*

7. *Remedy of Landowner Not Confined to Court of Claims.* The fact that by an act passed after the commission of the trespass (L. 1904, ch. 561) the Court of Claims was authorized to determine the damages resulting from such trespass, does not relegate the landowner to that court as the only forum in which he can prosecute his claim therefor, where such act expressly disclaims the creation or acknowledgment of any liability upon the part of the state. *Id.*

8. *The State Not Liable for the Tortious Acts of Its Officials.* The state as an entity cannot commit a trespass. It is liable for the tortious acts of its officers or agents only in special instances expressly created by law. When, therefore, public officers assume to act for the state, and although acting in good faith and believing themselves authorized to act for it, take and destroy property without due process of law and just compensation, their acts, being contrary to law, cannot be the acts of the state, but are their individual acts, for which they alone are responsible; and an action is maintainable against them personally to restrain the further commission of such unlawful acts and to recover the damages already accrued. *Id.*

State superintendent of elections — appointment of.

See CONSTITUTIONAL LAW, 1, 2.

Independent nomination of candidates for public office — validity of certificate.

See ELECTIONS, 1-3.

PARENT AND CHILD.

Provision in ante-nuptial contract whereby father of son about to marry agreed to provide equally for all of his children by will — when son may enforce contract.

See CONTRACT, 2, 5.

Right of adopted child to inherit.

See REAL PROPERTY, 1-4.

PARTNERSHIP.

See *Culhoun v. Buck* (Mem.), 598.

PARTIES.

Receiver in supplementary proceedings not necessary party plaintiff to judgment creditor's action to charge property held under trust.

See TRUST, 1, 2.

PARTITION.

When action of, cannot be maintained — acceptance of benefit under will involves renunciation of rights inconsistent with instrument.

See WILL, 4.

PAYMENT.

See *Roach v. City of New York* (Mem.), 592.

PLEADING.

See *Met. Milk & Cream Co. v. City of New York* (Mem.), 583.

Insufficient allegation of special damage caused by alleged libel.

See LIBEL, 3.

PLEADING — *Continued*

When complaint in action by riparian owner to restrain pollution of stream not demurrable.

See **RIPARIAN RIGHTS**, 2.

When failure to reply does not preclude plaintiff from contesting counterclaim.

See **SET-OFF**, 1.

POLICE.

See *People ex rel. Kenny v. Bingham* (Mem.), 522; *People ex rel. Reardon v. Bingham* (Mem.), 522; *People ex rel. Hurlbut v. Bingham* (Mem.), 523; *Matter of O'Rourke* (Mem.), 535; *People ex rel. Reardon v. Bingham* (Mem.), 539; *People ex rel. Kenny v. Bingham* (Mem.), 539; *People ex rel. Walters v. Lewis* (Mem.), 538.

Limitation of time to commence proceeding against city of New York not applicable to proceeding to restore a member of the police force to active duty.

See **NEW YORK (CITY OF)**, 4.

POLICE POWER.

When exercise of, not warranted.

See **OFFICERS**, 2.

PRINCIPAL AND AGENT.

1. *Fraud of Principal a Defense to Action by Agent to Recover Purchase Price of Stock Sold.* A defense that the owner of stock induced its sale by fraud is available to the purchaser in an action to recover the purchase price, brought by the broker who made the sale, since the relationship existing between a Stock Exchange broker and a customer is not so peculiar as to exempt it from the ordinary principles and rules of agency. *Leo v. McCormack.* 830

2. *When Principal's Fraud No Bar to Recovery of Amount Advanced Him by Broker on Stock Sold.* Where, however, the stock sold was held on margin, the broker has a lien thereon to the amount of his advances, and if not a party thereto, his principal's fraud is no bar to a recovery of such amount. *Id.*

See *Birkett v. Postal Tel. Cable Co.* (Mem.), 591.

PRINCIPAL AND SURETY.

See *Doon v. American Surety Co.* (Mem.), 598.

PROHIBITION.

Writ of — remedy of person served with void subpoena is by writ of habeas corpus, not by writ of prohibition.

See **CRIMES**, 7-11.

RAILROADS.

1. *Street Surface Railroads — Provision of Statute Incorporating Street Surface Railroad Company, to Keep Pavement Between Its Tracks in Good Repair — When Applicable to Extension of Railroad Constructed under Subsequent Statute.* Where a street surface railroad company was incorporated to build and operate a street surface railroad in and upon streets now within the city of New York under a special statute (L. 1863, ch. 361), to which was added, by a subsequent amendment (L. 1871, ch. 658), a provision requiring the company and its successors to "keep the surface of the street inside its rails and for one foot outside thereof in good and proper order and repair," and the company extended its lines over roads and streets, not named in its charter, under the authority of a subsequent act (L. 1874, ch. 553), amending the original act of incorporation, the company is compelled, upon the requirement of the authorities of the city, to lay a new granite block pavement between and for

RAILROADS—Continued.

one foot outside the rails of its tracks to conform with a new granite pavement laid by the city in the streets in which the extended lines are situated, although the statute authorizing the extension is silent upon the subject of repairs or repaving, since the authority to construct such extension was subject to the obligations contained in the original act of incorporation as amended. *Mayor, etc., of New York v. H. B., M. & F. R. Co.* 304

2. *Same*—*Obligation of Street Surface Railroad Company to Lay New Pavement Between Its Tracks at Demand of Municipality.* Where the statute under which a street surface railroad company was incorporated contains a provision requiring the company to "keep the surface of the street inside the rails and for one foot outside thereof in good and proper order and repair," the question of what shall constitute keeping the pavement in good order and repair should be determined, somewhat at least, with reference to existing and surrounding conditions; and where a municipality has for sufficient reason decided to pave a street with a new and better pavement, it is the duty of the railroad company to co-operate with the city and put its part of the street in the same condition as the remainder thereof, even though that necessitates the laying of a new pavement as distinguished from repairing an old one. *Id.*

See People ex rel. City of Geneva v. Geneva, etc., Traction Co. (Mem.), 516.

Action against, for negligence.

See NEGLIGENCE, 1.

When company not liable to passengers injured by trolley pole near track.

See NEGLIGENCE, 3.

RAPE.

See People v. Munnasovitch (Mem.), 592.

REAL PROPERTY.

1. *Trust Deed Conveying Life Estate with Remainder to Heirs of Beneficiary.* Land conveyed to a trustee in trust for the use and benefit of a designated beneficiary during her natural life and after her decease to her heirs at law passes to the person who is her heir at law at the date of her death, and not to those who were her heirs at law at the time of the execution and delivery of the trust deed. *Gilliam v. Guaranty Trust Co.* 127

2. *Same*—*When Adopted Child Takes Property upon Death of Beneficiary.* Where the *cestui que trust*, named in such trust deed, and her husband duly adopted, in 1883, pursuant to the provisions of the statute then in force (L. 1873, ch. 830), an infant as and for their lawful child, and thereafter they and such child sustained towards each other the mutually acknowledged relation of parent and child, and the *cestui que trust*, thereafter and subsequent to the death of her husband, died leaving her surviving no issue or descendants of any issue, such adopted child is her heir at law within the meaning of the deed of trust, and the property passes to such child rather than to the brothers of the deceased *cestui que trust*, who were her heirs at law at the time of the execution and delivery of the trust deed. *Id.*

3. *Same*—*Rights of Adopted Child.* Although the statute (L. 1873, ch. 830), under which such child was adopted, excluded adopted children from any right of inheritance, such child is entitled to the benefit of the statute (L. 1896, ch. 272, § 64, as amd. by L. 1897, ch. 408, § 64), enacted subsequent to the adoption, conferring the right of inheritance upon adopted children, and thereby became the heir at law of the *cestui que trust* and upon her death entitled to the trust property under the deed of

REAL PROPERTY — Continued.

trust; the brothers of the *cestui que trust*, who were living at the time of the execution of the trust deed, in 1853, and at the time of her death, did not by such relationship acquire any vested right during the life of their sister to the continuance of such heirship since the legislature had the power to change this right and provide for a different line of inheritance. *Id.*

4. *Same — Construction of Statutes Relating to Rights of Inheritance of Adopted Child.* The provisions of the statute (L. 1896, ch. 272, § 60) that "Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June 25, 1873, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created," have no application to the trust in question, although the trust deed was executed and delivered in 1838. It was not created by will or any testamentary provision, and is not a trust within the meaning of such statute; the only trust created was for the use and benefit of the *cestui que trust* named in the trust deed during her natural life, and after her decease to her heirs at law; the purpose of the trust and the functions of the trustee were all accomplished and discharged when the *cestui que trust* died, and after that event the property passed without the aid of any trust to her heirs; that is, to the persons whom the law should designate as her heirs when the time arrived. *Id.*

5. *Ejectment — Occupation by Telephone Wire of Space Above Land.* An action of ejectment will lie where the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant above the plaintiff's premises; the disseizin of the owner is measured by the extent of the space occupied and the sheriff can physically remove the wire and thereby restore the plaintiff to possession. *Butler v. Frontier Telephone Co.* 486

See Gehrhardt v. Schwartz (Mem.), 574; *Conger v. Ensler* (Mem.), 588; *Flagler v. Deakin* (Mem.), 589; *Weddigan v. Whiting* (Mem.), 596; *Titile v. Van Valkenburg* (Mem.), 597; *Smith v. Marsh* (Mem.), 605.

Indian lands — when occupant of lands may maintain action of ejectment against telephone company erecting poles and wires on his lands.

See INDIANS, 1, 2.

Liability of landlord for damages caused by third party.

See LEASE, 1.

Covenant for renewal of lease.

See LEASE, 2.

Insufficient notice of lien.

See LIENS.

When lower riparian owner may maintain action against a number of upper riparian owners to restrain them all, although acting separately, from polluting the waters of a stream.

See RIPARIAN RIGHTS, 1, 2.

Vendor's lien — property contracted to be sold subject to mortgages for certain amount but conveyed subject to mortgages for less amount — When vendor's lien may be enforced for difference in amount.

See VENDOR AND PURCHASER.

Devise — when acceptance of benefit under will involves renunciation of rights inconsistent with instrument.

See WILL, 4.

REMEDIES.

Premature action to recover damages for the repudiation by a mutual life insurance company of its obligation under a policy — remedy in equity.

See INSURANCE, 1, 2.

RIPARIAN RIGHTS.

1. *When Lower Riparian Owner May Maintain Action Against a Number of Upper Riparian Owners to Restrain Them All, Although Acting Separately, from Polluting the Waters of a Stream.* The owner of land abutting upon a canal, maintained from time immemorial for the purpose of leading the greater part of the waters of a stream to certain large mills, there to be used for power, may maintain an action in equity to restrain a number of corporations and persons, some sued simply as individuals and some as members of copartnerships, doing business on premises abutting upon the upper waters of the stream, from discharging tannery and factory refuse and other filthy substances into the stream, thereby polluting the waters and bed and banks of the stream and occasioning offensive deposits in the canal and upon the land of the plaintiff, whereby the comfort of the plaintiff and his tenants was destroyed, the premises rendered unhealthful and the value thereof diminished. *Warren v. Parkhurst.* 45

2. *Pleading — When Complaint in Such Action Not Demurrable.* The complaint in such action, considered as a bill in equity to restrain the further pollution of the stream by the defendant, is not demurrable upon the grounds: (1) "That it fails to state facts sufficient to constitute a cause of action" in that "The damages suffered by the plaintiff from the pollution of the stream by any one defendant, if there were no other sources of pollution, would be nominal;" and (2) upon the ground of "multifariousness, in that it commingles and blends certain alleged causes of action against certain defendants separately, which are not good against them jointly and do not affect all the defendants," where it is alleged that the injury suffered by plaintiff arises from the concurring and continuous trespass and wrongdoing of all the defendants, and that, if continued, the acts of the defendants will constitute a permanent nuisance and an irreparable injury to the premises and property rights of the plaintiff; since the acts of the defendants may be independent and several, but the results of these several acts combine to produce whatever damage or injury the plaintiff suffers, and in equity constitute but one cause of action. *Id.*

SALE.

See *Michigan Sav. Bank v. Miliar* (Mem), 606; *Michigan Sav. Bank v. Coy, Hunt & Co.* (Mem.), 607; *Michigan Sav. Bank v. Hubbs* (Mem.) 607.

Specific enforcement of contract of.

See CONTRACT, 1.

Of machine — parol evidence of express warranty.

See EVIDENCE, 2.

SERVICES.

Attorney's lien for — erroneous enforcement.

See ATTORNEY AND CLIENT.

Of canal boat and crew — breach of contract for.

See CONTRACT, 7.

SESSION LAWS.

1. 1863, Ch. 861, *Street Surface Railroads — Provision of Statute Incorporating Street Surface Railroad Company, to Keep Pavement Between Its Tracks in Good Repair — When Applicable to Extension of Railroad Constructed Under Subsequent Statute.* Where a street surface railroad company was incorporated to build and operate a street surface railroad in

SESSION LAWS — *Continued.*

and upon streets now within the city of New York under a special statute (L. 1863, ch. 361), to which was added, by a subsequent amendment (L. 1871, ch. 658), a provision requiring the company and its successors to "keep the surface of the street inside its rails and for one foot outside thereof in good and proper order and repair," and the company extended its lines over roads and streets, not named in its charter, under the authority of a subsequent act (L. 1874, ch. 553), amending the original act of incorporation, the company is compelled, upon the requirement of the authorities of the city, to lay a new granite block pavement between and for one foot outside the rails of its tracks to conform with a new granite pavement laid by the city in the streets in which the extended lines are situated, although the statute authorizing the extension is silent upon the subject of repairs or repaving, since the authority to construct such extension was subject to the obligations contained in the original act of incorporation as amended. *Mayor, etc., N. Y. v. H. B., M. & F. Ry. Co.* 304

1871, *Ch.* 658. See par. 1, this title.

2. 1873, *Ch.* 680 — *When Adopted Child Takes Property upon Death of Beneficiary.* Where the *cestui que trust*, named in a trust deed, and her husband duly adopted, in 1863, pursuant to the provisions of the statute then in force (L. 1873, ch. 830), an infant as and for their lawful child, and thereafter they and such child sustained toward each other the mutually acknowledged relation of parent and child, and the *cestui que trust*, thereafter and subsequent to the death of her husband, died leaving her surviving no issue or descendants of any issue, such adopted child is her heir at law within the meaning of the deed of trust, and the property passes to such child rather than to the brothers of the deceased *cestui que trust*, who were her heirs at law at the time of the execution and delivery of the trust deed. *Gilliam v. Guaranty Trust Co.* 127

3. *Idem* — *Rights of Adopted Child.* Although the statute (L. 1873, ch. 830), under which such child was adopted, excluded adopted children from any right of inheritance, such child is entitled to the benefit of the statute (L. 1896, ch. 272, § 64, as amd. by L. 1897, ch. 408, § 64), enacted subsequent to the adoption, conferring the right of inheritance upon adopted children, and thereby became the heir at law of the *cestui que trust* and upon her death entitled to the trust property under the deed of trust; the brothers of the *cestui que trust*, who were living at the time of the execution of the trust deed, in 1853, and at the time of her death, did not by such relationship acquire any vested right during the life of their sister to the continuance of such heirship since the legislature had the power to change this right and provide for a different line of inheritance. *Id.*

4. *Idem* — *Construction of Statutes Relating to Rights of Inheritance of Adopted Child.* The provisions of the statute (L. 1896, ch. 272, § 60) that "Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June 25, 1873, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created," have no application to the trust in question, although the trust deed was executed and delivered in 1853. It was not created by will or any testamentary provision, and is not a trust within the meaning of such statute; the only trust created was for the use and benefit of the *cestui que trust* named in the trust deed during her natural life, and after her decease to her heirs at law; the purpose of the trust and the functions of the trustee were all accomplished and discharged when the *cestui que trust* died, and after that event the property passed without the aid of any trust to her heirs; that is, to the persons whom the law should designate as her heirs when the time arrived. *Id.*

1874, *Ch.* 553. See par. 1, this title.

SESSION LAWS — *Continued.*

5. 1883, *Ch. 26* — *New York (City of) — Marine Court — Change in Name.* The statute (L. 1883, ch. 26) providing that on and after the 1st day of July, 1883, the Marine Court of the city of New York, established as a court of record in 1876, should be designated as the City Court of New York, merely changed the name of the court and had no effect upon proceedings past or pending; and a judgment obtained in the Marine Court and docketed in New York county on the 3d day of November, 1881, is not the judgment of an "extinct court," but may be enforced like any other judgment of a court of record. *Peace v. Wilson.* 403

6. 1886, *Ch. 572* — *Section 396 of the Code of Civil Procedure Not Affected by — Infancy.* Chapter 572 of the Laws of 1886, providing in substance that no action for negligence can be maintained against a municipality having 50,000 inhabitants or over, "unless the same shall be commenced within one year after the cause of action therefor shall have accrued," while it created a special limitation in respect to actions for personal injuries against a particular class of defendants, left that special limitation, like the general limitation prescribed in chapter 4 of the Code of Civil Procedure, subject to suspension during the existence of any of the disabilities specified in section 396, one of which is infancy. *McKnight v. City of New York.* 35

7. 1890, *Ch. 534* — *Stock Corporation Law — Reduction of Number of Directors.* A resolution to reduce the number of directors of a stock corporation under section 21 of the Stock Corporation Law (L. 1890, ch. 534; amd. L. 1903, ch. 750) does not take effect until the date of the filing in the proper offices of the transcript of the proceedings of the meeting at which the resolution was adopted; the simple adoption of the resolution is insufficient to reduce the number of directors; nor does a subsequent filing relate back so as to give effect to a resolution not operative of itself. *Matter of Westchester Trust Co.* 215

8. 1892, *Ch. 679* — *Indian Law — When Lands Occupied by Members of Nation Deemed to Have Been Allotted Under the Indian Law — When Occupant of Lands May Maintain Action of Ejectment Against Telephone Company Erecting Poles and Wires on His Lands.* Where a member of the Tonawanda Nation of Seneca Indians has occupied and been in undisputed possession of lands within the reservation, purchased by his mother from the chiefs of the nation in 1859, for a period of more than twenty-two years, the presumption that such occupant holds the lands under an allotment within the meaning of section 56 of the Indian Law (L. 1892, ch. 679, § 56) is controlling, and he must be deemed to be the owner in fee, having the full Indian title, as a member of the Tonawanda Nation of Seneca Indians, to the land in question, subject to the easement of the public, for the purposes of travel in a highway running through such lands; and as such owner in fee is entitled to maintain an action of ejectment against a telephone company which has erected telephone poles and stretched wires upon his lands along the highway without his consent, notwithstanding the fact that the company has obtained permission from the council of the nation to erect such poles and wires across the lands of the reservation. *Jemison v. Bell Telephone Co.* 493

See, also, par. 21, this title.

1896, *Ch. 272.* See pars. 3 and 4, this title.

9. 1896, *Ch. 568* — *Judgments — Actions on Judgments for Money Between Original Parties to the Judgment — Effect of Statute Amending Section 1913 of Code of Civil Procedure.* The statute (L. 1896, ch. 568), which added to section 1913 of the Code of Civil Procedure, relating to actions upon judgments for a sum of money, between the original parties, a provision that such an action can be maintained when "ten years have elapsed since the docketing of such judgment," is retroactive in its application although it contains no affirmative declaration to that effect; and, hence, an

SESSION LAWS — *Continued.*

action, commenced September 20, 1901, upon a judgment docketed November 8, 1881, may be maintained by the original plaintiffs against the original defendants without alleging compliance with either of the other requirements of section 1913. *Peace v. Wilson.* 403

10. 1896, *Ch. 908* — *Tax Law — Transfer Tax — Policy Issued upon Life of Non-resident of State — When Proceeds Thereof Not Subject to Taxation Within This State.* The proceeds of a life insurance policy, issued upon the life of a non-resident by a domestic corporation and payable to the estate of the insured at the principal office of the company within this state, should be regarded as property within the state of decedent's residence rather than property within this state, and, therefore, not subject to a transfer tax under subdivision 2 of section 220 of the Tax Law (L. 1896, ch. 908, § 220), relating to the taxation of property of non-resident decedents within this state; where it appears that the insured was a resident of a foreign state at the time the policy was issued; that the policy had at all times been kept within that state and the premiums paid there; that the insured died there; that his will was admitted to probate and his executors appointed there; that the proofs of death might have been made there, if the policy had not been voluntarily paid; that the company, as a condition of doing business in that state, had designated a certain official thereof to receive service of process with the same effect as if served personally upon the company; and that, at the time of the death of the insured, there was sufficient property of the company within that state to satisfy the policy, so that it would not have been necessary for decedent's executors to come to this state to protect and collect his claim under the policy, if it had not been paid; such circumstances are sufficient to fix the situs of the contract of insurance and the claims arising thereunder in the state of decedent's residence and not within this state. *Matter of Gordon.* 471

11. 1896, *Ch. 909* — *Election Law — Certificate for Independent Nomination Valid, Although Made for the Nomination of More Than One Candidate.* When certificates for independent nominations, made and filed under the provisions of the Election Law (L. 1896, ch. 909, §§ 57, 58 and 59), are required to be filed in the same office, one of such certificates is not invalid because made for the nomination of more than one candidate where the electors making it are qualified to make a certificate for the nomination of all of the candidates mentioned therein. *Matter of Independent Nominations.* 266

12. *Idem* — *Contest Between Several Sets of Local Independence League Nominations — When Certificate First Filed Is Entitled to Preference.* Where there is a contest between several sets of local Independence League nominations the certificate first filed under that title is entitled to preference, provided that, under the provisions of section 56 of the Election Law, it was filed by the same "independent body" which had made the state nominations. Whether the electors who joined in the first certificate or those who made the second certificate were the same "independent body" presents a question of fact on which the Court of Appeals is concluded by the decisions of the courts below. *Id.*

13. 1897, *Ch. 378* — *New York City Charter — False Imprisonment — Erroneous Refusal to Charge as to Liability for Arrest.* Where it appears in an action to recover damages for false imprisonment that the person making the arrest was a special patrolman appointed by the police board of the city of New York, at the request of the defendant, under section 308 of the charter (L. 1897, ch. 378), which provided that such patrolman should "possess all the powers and discharge all the duties of the police force applicable to regular patrolmen," but that he should be paid by the party upon whose application he is appointed, and the trial court expressly charges that the acts of the officer in connection with the arrest

SESSION LAWS—*Continued.*

of the plaintiff were performed in his capacity as a police officer, it is reversible error to refuse to charge that the defendant was not liable therefor, since the latter was liable only for the acts of the officer, committed by him as its employee. *Tyson v. Bauland Co.* 397

1897, *Ch.* 408. See par. 8, this title.

14. 1897, *Ch.* 612—*Negotiable Instruments Law—Liability of Indorser to Payee.* The reception of evidence tending to establish the fact that the defendant had indorsed the note in suit with the purpose of giving the maker credit with the payee, even if erroneous, is immaterial, where the note was executed after the enactment of the Negotiable Instruments Law (L. 1897, ch. 612, § 114) which changed the rule that the indorser was presumed to be the second indorser and not liable to the payee and provided that "where a person not otherwise a party to the instrument places thereon his signature in blank before delivery, he is liable as indorser * * * if the instrument is payable to the order of a third person, * * * to the payee and all subsequent parties." *Far Rockaway Bank v. Norton*, 484

15. 1897, *Ch.* 788—*Utica (City of)—Assessment for Sewer—When Erroneous under Statutes Creating Board of Assessors in and for City of Utica.* Where a sewer which provides adequate drainage for the premises situated upon the west side of a street in the city of Utica was built many years ago and the entire cost thereof was assessed solely upon the property upon that side of the street because it conferred no benefit upon the premises on the east side of the street, which is considerably lower and cannot drain into such sewer, it is erroneous in making the assessment for a sewer subsequently built upon and for the benefit of the east side of the street to assess the property owners on the west side of the street at the same rate per foot as those on the east side, where the statute (L. 1897, ch. 788, as amd. by L. 1898, ch. 215 and L. 1901, ch. 384, § 11, sub. 2) creating a board of assessors in and for the city of Utica and defining its powers, directs the board to assess the expense of sewer construction "upon the lands benefited by the local improvement in proportion to such benefit;" since the assessment ignores the radical difference in the benefit conferred upon the west side property, which was already supplied with an adequate sewer paid for solely out of an assessment on the west side, and the benefit conferred upon the east side property which was wholly without any sewer until the present improvement. *People ex rel. Keim v. Desmond*, 282

1898, *Ch.* 215. See par. 15, this title.

16. 1898, *Ch.* 676—*Metropolitan Elections District Law—State Superintendent of Elections—Office New in Name and Functions.* The office of state superintendent of elections created by the Metropolitan Elections District Law (L. 1898, ch. 676; L. 1905, ch. 689) is new in name and essentially new in functions; the legislature, therefore, was authorized to provide for appointment of its incumbent by the governor instead of by some local authority, and the law in that particular is a valid exercise of legislative power. *Matter of Morgan v. Furey*, 202

1901, *Ch.* 384. See par. 15, this title.

17. 1901, *Ch.* 466—*New York City Charter—Taking of Lands Owned by City, for Water Pipe Lines, for Street Purposes.* Where the board of street opening and improvement of the city of New York, acting under the authority of section 970 of the charter, adopted a resolution requesting the counsel to the corporation to acquire title "wherever the same has not been heretofore acquired for the use of the public to the lands, tenements and hereditaments that shall or may be required for the purpose of opening and extending Van Cortlandt Avenue" between points

SESSION LAWS — Continued.

therein named, and directed "That the entire cost and expense of such proceedings shall be assessed upon the property deemed to be benefited thereby," the commissioners of estimate and apportionment, duly appointed to ascertain and determine the compensation to be made to the respective owners of the land to be taken, and to assess the cost of the improvement upon the persons and property deemed to be benefited thereby, as provided by section 980 of the charter, are justified in including in their award of damages an amount allowed to the city of New York for the loss and damage sustained by it by the opening and extension of said avenue over certain parcels of land previously acquired and purchased by the city in fee simple absolute for the purpose of laying and maintaining thereunder water pipe lines for the city water supply, said parcels of land having been paid for from the proceeds of bonds issued for that purpose and payable by general taxation. *Matter of Mayor, etc., of N. Y.* 237

18. *Idem.* — *When City Entitled to Compensation for Lands so Taken.* The lands belonging to the city for its water pipe lines and taken under the resolution opening and extending Van Cortlandt avenue, were never acquired for street purposes, but the language of that resolution has special reference to the opening and extension of that avenue, and should be construed not only with reference to that purpose but also with reference to section 995 of the charter providing that when any property belonging to the city of New York be required for the opening or extension of streets or shall be benefited thereby "the city shall be entitled to compensation and recompense for the loss and damage it may sustain, and shall be bound to allow and pay for the benefit and advantage it may be deemed to acquire thereby, in like manner as other owners and proprietors of lands and premises required for the purpose of making the said * * * improvement, or deemed to be benefited thereby;" and so construed it must be held that it was not the intention of the board of street opening and improvement, by their resolution, to except from the lands to be acquired that part thereof that had already been acquired by the city for the purposes of the water supply. *Id*

19. *Idem.* — *Dedication of Lands Owned by the City, for Other Purposes, for Street Improvements — Purpose and Effect of Section 995 of the City Charter.* Where real property has been acquired by the city of New York for general corporate purposes and paid for by general tax, the taking thereof for street purposes, by which the owners of abutting lands are benefited to the extent of the cost of the improvement, would result in a benefit to the abutting owners at the expense of the general taxpayer unless compensation could be allowed to the city for its lands so taken, since the proceeding, so far as the city is concerned as the owner in fee of the lands in question, results in a dedication of such lands for street purposes, and section 995 of the city charter was enacted for the express purpose of adjusting the rights and equities between abutting owners and the general taxpayer so that the city should receive compensation for its loss and damage in such cases "in like manner as other owners and proprietors of lands and premises required for the purpose of making the said * * * improvement." *Id.*

20. *Idem.* — *New York City Charter — Police Department.* The limitation on the time to commence a proceeding contained in section 802 of the charter of the city of New York (L. 1901, ch. 466), does not apply to a proceeding to restore to active duty a member of the police force who has been retired on account of alleged physical incapacity. *People ex rel. Hurlbut v. Bingham.* 588

21. 1902, Ch. 296 — *Indians — Tonawanda Nation of Seneca Indians — Jurisdiction of State of New York Over Lands Owned by Nation and Members Thereof — Constitutionality of Statute Regulating the Erection of Telephone and Telegraph Lines upon Such Reservation and Lands.* Under a

SESSION LAWS — *Continued.*

decision, made in 1786, by commissioners appointed by the states of Massachusetts and New York to settle a controversy between such states relating to lands now held by the Tonawanda Nation of Seneca Indians, and under a subsequent treaty between such tribe and the United States government, the state of New York exercises exclusive sovereignty and jurisdiction over the Tonawanda Nation of Seneca Indians and the lands held by such nation or by individual members thereof, and consequently the provisions of the United States statutes enacted for the regulation of commerce with the Indian tribes pursuant to the Constitution of the United States (U. S. Const. art. 1, § 8, subd. 3) are not violated by the statute (L. 1902, ch. 206) amending the Indian Law (L. 1892, ch. 679) by adding thereto a new section (89), providing that when any telephone or telegraph company shall erect poles; for the purpose of supporting telephone or telegraph wires, upon lands allotted to or otherwise owned by individual members of the Seneca Nation on the Tonawanda reservation, the damages caused thereby, to be fixed by agreement or in condemnation proceedings, shall be paid to such owners in addition to any sum paid to the council of the nation for the privilege of erecting poles upon the reservation. *Jemison v. Bell Telephone Co.* 493

22. 1902, Ch. 473 — *Exercise of Power of Eminent Domain Not Authorized by Statute Directing Survey.* The statute (L. 1902, ch. 473) directing the state engineer to "locate, establish and permanently mark upon the ground" the boundary line in dispute and appropriating \$40,000 for the purposes of the act, does not authorize him, as an agent of the state, to exercise the power of eminent domain in order to effect the purpose of the act, in the absence of any indication of an intent to confer such power and of any provision for compensation for private property to be taken and destroyed. *Litchfield v. Bond.* 66

23. 1903, Ch. 348 — *Statute Ineffective as a Ratification by the State.* The statute (L. 1903, ch. 348) enacted subsequently to a trespass by state officers, even if authorizing the taking or invasion of private property for public use, does not afford any protection to the wrongdoers as against the owner where his property has been taken before its passage. *Id.*

24. 1904, Ch. 561 — *Remedy of Landowner Not Confined to Court of Claims.* The fact that by an act passed after the commission of a trespass by state officers (L. 1904, ch. 561) the Court of Claims was authorized to determine the damages resulting from such trespass, does not relegate the landowner to that court as the only forum in which he can prosecute his claim therefor, where such act expressly disclaims the creation or acknowledgment of any liability upon the part of the state. *Id.*

1905, Ch. 689. See par. 16, this title.

1905, Ch. 750. See par. 7, this title.

25. 1906, Ch. 125, *New York City — Gas Companies — United States Circuit Court Injunction Restraining the Enforcement of Eighty Cent Gas Act No Bar to Action in State Court by Consumer Restraining Gas Company From Cutting Off Gas — Principle of Comity Not Applicable.* An injunction issued by the Circuit Court of the United States in a suit by the Consolidated Gas Company of the city of New York to determine the constitutionality of chapter 125 of the Laws of 1906 fixing the maximum price of gas in that city at eighty cents per 1,000 feet, alleged to be invalid as in contravention of the 14th amendment of the United States Constitution and of section 10 of article 1 thereof, and to restrain the enforcement of the provisions of the statute, does not prevent the maintenance of an action in the Supreme Court of this state by a consumer not a party to the former suit, to restrain the gas company from cutting off the gas from his premises for failure to pay the rate authorized before the enactment of

SESSION LAWS — Continued.

the statute, where, although the injunction of the United States court permitted such rate to be charged, the difference to be paid into court to await the determination of the controversy, it contained no provision requiring a consumer to pay the former rate or to refrain from defending any action to recover that amount or from maintaining any action to prevent the company from enforcing payment by cutting off gas from his premises; an injunction order in such action granting the relief sought is not in conflict with that issued by the United States court, and there is nothing in the principle of comity prohibiting the state court from entertaining jurisdiction to the extent of granting it. *Richman v. Consolidated Gas Co.* 209

SET-OFF.

1. *Pleading — When Failure to Reply Does Not Preclude Plaintiff From Contesting Counterclaim.* A plaintiff is not precluded from contesting a counterclaim by a failure to serve a reply unless the counterclaim is distinctly named and pleaded as such in the answer. *American Guild v. Damon.* 360

2. *Foreclosure of Mortgage by Assignee Thereof — When One of Two Defendants May Set Off Counterclaim Against Plaintiff's Assignor — When Plaintiff's Claim Extinguished Thereby.* Under the provisions of the Code of Civil Procedure (§§ 502, 1909) the assignment of a mortgage is subject not only to every defense, but to every counterclaim which might have been set up against the assignor; and in an action brought by an assignee to foreclose a mortgage executed by a husband and wife to secure the payment of a joint and several bond executed and delivered to the mortgagee at the same time, and to recover a money judgment against each defendant for any deficiency that might arise on the sale of the mortgaged property, the husband may, under section 501 of the Code of Civil Procedure, counterclaim and set off a claim existing in his own favor against the plaintiff's assignor, and the allowance thereof inures to the benefit of both defendants; and where the claim is equal to or greater than the amount due on the bond and mortgage, it extinguishes the liability of both defendants and operates as a discharge of both instruments; the fact that the action is in form joint does not affect the principle involved. *Id.*

SPECIFIC PERFORMANCE.

Of contract.

See APPEAL, 2.

When contract may be enforced by action for.

See CONTRACT, 1.

STATE.

Apportionment of.

See APPEAL, 1.

When unauthorized acts of state engineer in making a state survey constitute a trespass — remedy of landowner — when state not liable.

See OFFICERS, 1-8.

STEAMSHIP COMPANIES.

Liability for loss of baggage.

See CARRIERS.

STOCKBROKERS.

See *Lery v. Popper* (Mem.), 600.

STOCKHOLDERS.

See Case v. N. Y. M. S. & L. Assn. (Mem.), 570.

Right of, to subscribe for his proportionate share of increased capital stock — when he may recover damages upon sale of his share of new stock to a third party.

See CORPORATIONS, 4, 5.

STOCKS.

Increase in capital stock of corporation — right of stockholder to subscribe for his proportionate share of new stock.

See CORPORATIONS, 4, 5.

When fraud of principal a defense to action by agent to recover purchase price of stock sold.

See PRINCIPAL AND AGENT, 1, 2.

Transfer tax — when not assessable at full value.

See TAX, 1.

STREETS.

See People ex rel. City of New York v. Lyon (Mem.), 545; Rogers v. City of Binghamton (Mem.), 595.

When village not liable for injuries arising from slight defect in sidewalk.

See NEGLIGENCE, 4.

Taking of lands owned by city for street purposes — when city entitled to compensation.

See NEW YORK (CITY OF), 1-3.

Obligation of street surface railroad to lay new pavement between its tracks.

See RAILROADS, 1, 2.

SUBPŒNA.

Issued by magistrate to discover commission of a crime — when void — remedy of person served with void subpœna.

See CRIMES, 7-11.

SURPLUS MONEY.

See Horrman v. Ferguson (Mem.), 544; Brevoort Real Estate Co. v. Kingston (Mem.), 584.

TAX.

1. *Transfer Tax — Stock of Boston and Albany Railroad Company Owned by Non-resident Testator Not Assessable at Its Full Value.* For the purpose of imposing a transfer tax upon stock of a non-resident testator in the Boston and Albany Railroad Company (a consolidated corporation separately created and organized under the laws of the state of New York and the state of Massachusetts, whose principal offices and the greater part of its lines are situated in the latter state), the valuation of the stock should be based upon an apportionment of the property between the New York and Massachusetts corporation; the stock should be appraised, not at its full value, but at a value representing the property of the corporation within this state, and a proper proportion of that situate outside of either state and moving (as in the case of rolling stock) back and forth between both states; such a method avoids double taxation, is equitable and just, and there is nothing in the statute or decisions thereunder requiring a tax measured by the full value of the stock in each state upon the theory that the corporation in that state owns all the property of the consolidated company. *Matter of Cooley.* 220

TAX — *Continued.*

2. *Transfer Tax* — *Policy Issued upon Life of Non-resident of State — When Proceeds Thereof Not Subject to Taxation Within This State.* The proceeds of a life insurance policy, issued upon the life of a non-resident by a domestic corporation and payable to the estate of the insured at the principal office of the company within this state, should be regarded as property within the state of decedent's residence rather than property within this state, and, therefore, not subject to a transfer tax under subdivision 2 of section 220 of the Tax Law (L. 1896, ch. 908, § 220), relating to the taxation of property of non-resident decedents within this state; where it appears that the insured was a resident of a foreign state at the time the policy was issued; that the policy had at all times been kept within that state and the premiums paid there; that the insured died there; that his will was admitted to probate and his executors appointed there; that the proofs of death might have been made there, if the policy had not been voluntarily paid; that the company, as a condition of doing business in that state, had designated a certain official thereof to receive service of process with the same effect as if served personally upon the company; and that, at the time of the death of the insured, there was sufficient property of the company within that state to satisfy the policy, so that it would not have been necessary for decedent's executors to come to this state to protect and collect his claim under the policy, if it had not been paid. Such circumstances are sufficient to fix the situs of the contract of insurance and the claims arising thereunder in the state of decedent's residence and not within this state. *Matter of Gordon.* 471

Erroneous assessment for sewer.

See ASSESSMENT, 1, 2.

See People ex rel. N. Y. Juvenile Asylum v. O'Donnell (Mem.), 585.

TELEPHONE COMPANIES.

When occupant of lands allotted under the Indian Law may maintain action of ejectment against telephone company erecting poles and wires on his lands.

See INDIANS, 1, 2.

Ejectment — occupation by telephone wire of space above land.

See REAL PROPERTY, 5.

TITLE.

See Sandiford v. Town of Hempstead (Mem.), 554; *Carolán v. Yoran* (Mem.), 575.

To cause of action — when not divested from adjudicated bankrupt.

See BANKRUPTCY.

TRADE MARKS.

See Gluckman v. Strauch (Mem.), 580; *Fromer v. Ottenberg* (Mem.), 561.

TRANSFER TAX.

See Matter of Hanford (Mem.), 547; *Matter of Lord* (Mem.), 549; *Matter of Hull* (Mem.), 586.

When stock owned by non-resident testator not assessable at its full value.

See TAX, 1.

Proceeds of policy of insurance upon life of non-resident of state not subject to.

See TAX, 2.

TRESPASS.

See Erwin v. Erie R. R. Co. (Mem.), 550; *Rockefeller v. Lamora* (Mem.), 567; *Pierie v. Smith* (Mem.), 602.

When unauthorized acts of state engineer in making a survey constitute a trespass.

See OFFICERS, 1-8.

TRIAL.

Erroneous exclusion of evidence.

See CONTRACT, 6.

For forgery — when evidence of utterance of other forged notes by defendant admissible — when contents of forged papers may be proved by secondary evidence — self-serving declarations and hearsay statements — when erroneous taking of exhibits by jury does not warrant reversal of judgment of conviction.

See CRIMES, 1-3.

Measure of damages — erroneous ruling.

See DAMAGES.

Erroneous admission of opinion of expert upon question of fact determinable by a jury.

See EVIDENCE, 1.

Admissibility of parol evidence to complete written agreements executed subsequent to an oral contract.

See EVIDENCE, 2.

Erroneous exclusion of testimony tending to show inconsistency of plaintiff's claim.

See EVIDENCE, 3.

Erroneous refusal to charge as to liability for arrest.

See FALSE IMPRISONMENT, 1.

TROY (CITY OF).

See People ex rel. Troy Press Co. v. Common Council (Mem.), 548.

TRUST.

1. *When Testamentary Trust Void as to Creditors of Cestui Que Trust.* A testamentary trust to pay to the husband of testatrix all of the income and such part of the principal of the estate as might be necessary for his support and maintenance, and whenever he should "desire to engage in any business or enterprise" to pay him, upon notice, "the whole or any part of such principal," is void as to creditors, and a judgment obtained against him after the death of testatrix is an enforceable lien against real estate covered by the attempted trust. *Ullman v. Cameron*. 339

2. *Same — When Judgment Creditors May Maintain Action to Charge Property Held under Trust — Receiver in Supplementary Proceedings Not Necessary Party Plaintiff.* Judgment creditors of such *cestui que trust* are proper parties plaintiff in an action in equity to have the attempted trust adjudged void and the land covered by the trust charged with the payment of their judgment, and may maintain such action, notwithstanding a receiver has been appointed in proceedings supplementary to the return of an unsatisfied execution, issued upon their judgment, since the appointment of the receiver did not transfer the lien of the plaintiffs' judgment to him. He took the land subject to their lien. They still owned it and had a right to enforce it. They had a cause of action for that purpose which was exclusively their own, and in which he had no interest. They did not assign their judgment to him by procuring his appointment,

TRUST—Continued.

nor did they thereby assign their lien to him, or estop themselves from enforcing it. *Id.*

Deed conveying life estate with remainder to heirs of beneficiary—rights of adopted child.

See REAL PROPERTY, 1-4.

TRUSTEES.

When trustee for mortgage bonds not liable as guarantor of bonds by reason of statements indorsed thereon.

See BONDS.

UTICA (CITY OF).

Erroneous assessment for sewer.

See ASSESSMENT, 1, 2.

VENDOR AND PURCHASER.

Real Property—Vendor's Lien—Property Contracted to Be Sold Subject to Mortgages for Certain Amount but Conveyed Subject to Mortgages for Less Amount—When Vendor's Lien May Be Enforced for Difference in Amount. The facts examined in an equitable action to establish a vendor's lien on real estate in which the issue was whether or not such a lien was created, where the purchasers had contracted to take the property for a certain sum in cash and subject to four mortgages, one of which, the third, was secured by a collateral mortgage on other property owned by the vendors: it being provided by such third mortgage that when the property covered by it was sold, \$3,000 should become due thereon, and that when \$4,000 was paid thereon the collateral mortgage should be discharged, and at the time of closing title the assignee of such third mortgage, who was the wife of one of the purchasers, refused to accept on such mortgage the sum of \$3,000 from the vendees and the sum of \$1,000 from the vendors and subrogate them to the extent of \$1,000 in such mortgage; whereupon the vendors who had contracted to sell the property covered by the collateral mortgage free and clear from incumbrances, paid such assignee the sum of \$1,000, in consideration of which she released and canceled the collateral mortgage, the result being that the purchasers paid in cash and by the assumption of mortgages \$1,000 less than they agreed to pay for the premises. *Held*, that the payment of said \$1,000 by the vendors to obtain a discharge of the collateral mortgage is to be considered in law as a part of the purchase money, and the purchasers having refused to pay the same on closing title, a vendor's lien was at once impressed on the premises. *Bach v. Kidansky.* 368

VENDOR AND VENDEE.

Enforcement of contract of sale.

See CONTRACT, 1.

VILLAGES.

When not liable for injuries arising from slight defect in sidewalk.

See NEGLIGENCE, 4.

WAIVER.

Of payment of interest on corporate bonds.

See MORTGAGE.

WARRANTY.

Parol evidence of express warranty of machine sold under oral contract.

See EVIDENCE, 2.

WASTE.

Personal liability of directors of corporation for wasted corporate funds

See CORPORATIONS, 1, 2.

WATERS AND WATERCOURSES.

See United States Leather Co. v. Aldrich (Mem.), 558.

When lower riparian owner may maintain action against a number of upper riparian owners to restrain them all, although acting separately, from polluting the waters of a stream.

See RIPARIAN RIGHTS, 1, 2.

WILL.

1. *Death of Legatee Before Payment of Legacy.* A limitation over, to take effect in case of the death of a legatee before the conveyance and payment of the legacy, is effective if the legatee does not live to become entitled to it and to demand its payment or maintain an action therefor. *March v. March.* 99

2. *Presumption as to Testator's Intention.* The presumption exists that a testator, in the absence of unfriendly relations between himself and his descendants, had the desire and intent that his property should go to his descendants rather than to strangers to his blood, and should be considered in the interpretation of his will. *Id.*

3. *Legacy Passes to Issue of Deceased Legatee and Not to His Devisees.* A testamentary provision, "That in the event of the death of any of my children before the conveyance and payment to him of the share of my estate herein given to him; or of either of my children whose share of my estate is held in trust, that my Executors convey, pay and assign the share of the one so dying to his or her issue absolutely, and if he or she shall leave no issue, then that they convey, pay, assign and divide such share or the proceeds thereof to and among my surviving children and to the issue of any deceased child, such issue to take by representation the part or share his, her or their parents would have been entitled to, if living." is effective to vest in a grandchild that portion of the share of his father, who died after the testator, but before the executors, who, under the will, had discretionary power to sell the real estate, could, by the exercise of diligence and good faith, dispose of a portion of it situated in a foreign state and, therefore, were unable to pay over to the father his share of the proceeds of the sale. *Id.*

4. *Acceptance of Benefit under Will Involves Renunciation of Rights Inconsistent with Instrument.* Where a testator devises a parcel of real estate owned by him to one of his grandchildren, and assumes to devise to the other grandchild a parcel in which he has but a life interest and which is owned by the grandchildren as tenants in common, the devisee cannot accept the devise, with knowledge of all the facts, without being precluded from asserting a claim to the other parcel attempted to be devised, and, therefore, cannot maintain an action to partition the same. *Beeton v. Stoops.* 456

See Matter of Pillsbury (Mem.), 545.

When testamentary trust void as to creditors of *cestui que trust*.

See TRUST, 1, 2.

TABULAR LIST OF OPINIONS.

CULLEN, Ch. J.

LIFE INSURANCE POLICY.

Deduction of semi-annual premium from amount due.
Bracher v. Equitable Life Assur. Society, 62, 64.

CONTRACT.

When contract may be enforced by action for specific performance after attempted rescission thereof.
St. Regis Paper Co. v. Santa Clara Lumber Co., 89, 92.

WILL.

Death of legatee before payment of legacy; Presumption as to testator's intention; When legacy passes to devisees of deceased legatee and not to his issue. (Dis. op.)
March v. March, 99, 120.

HIGHWAY.

Speed contest by automobiles on public highway; When spectator injured thereby cannot recover because contest, and use of highway, was illegal; Liability of defendants dependent upon question of fact whether they were guilty of negligence or of committing a nuisance in the manner of conducting the race.
Johnson v. City of New York, 130, 143.

APPEAL.

Effect of order of Appellate Division reversing judgment on questions of law only; Pleading; When failure to reply does not preclude plaintiff from contesting counterclaim; When order of reversal erroneously grants new trial instead of modifying judgment; Foreclosure of mortgage by assignee thereof; When one of two defendants may set off counterclaim against plaintiff's assignor; When plaintiff's claim extinguished thereby.
American Guild v. Damon, 360, 362.

FALSE IMPRISONMENT.

Erroneous refusal to charge as to liability for arrest.
Tyson v. Bauland Co., 397, 398.

PROMISSORY NOTE.

When evidence of sufficient funds to pay note deposited by maker with payee immaterial; Liability of indorser to payee; Negotiable Instruments Law, § 114.
Far Rockaway Bank v. Norton, 484, 485.

GRAY, J.

PUBLIC OFFICERS.

Acts of state engineer in making a state survey, under statute (L. 1902, ch. 473) to determine boundaries of certain counties authorized by statute directing survey; Subsequent statute (L. 1903, ch. 348) effective as a ratification by the State; General power of the state to make a survey sufficient as a justification; Remedy of landowner confined to Court of Claims. (Dis. op.)

Litchfield v. Bond, 66, 85.

LIBEL.

When corporation may maintain action for libel; When alleged libelous statements are not libelous per se; Pleading; Insufficient allegation of special damage caused by alleged libel.

Reporters' Assn. of America v. Sun Printing & Pub. Assn., 437, 440.

FALSE IMPRISONMENT.

Conviction for misdemeanor by a justice of the peace proceeding without jurisdiction.

McCarg v. Burr, 467, 468.

O'BRIEN, J.

CRIMES.

Stay of proceedings; Bail; Re-arrest of defendant released on bail pending determination of application for stay of proceedings; Habeas corpus; Affirmance of order releasing relator from custody. (Dis. op.)

People ex rel. Hummel v. Reardon, 164, 178.

ANTE-NUPTIAL CONTRACT.

Provision thereof, whereby father agreed to make no distinction between his son and other children in the distribution of his estate by will; When the son may not enforce the contract by action in equity; When failure of son to interpose objections to father's will precludes maintenance of action to enforce ante-nuptial contract; Complaint in equitable action demurrable because the ante-nuptial contract would not support action at law; Validity of consideration of ante-nuptial contract. (Dis. op.)

Phalen v. United States Trust Co., 178, 190.

EDWARD T. BARTLETT, J.

INSURANCE.

When policyholder may maintain action to recover damages for the repudiation by a mutual life insurance company of its obligations under a policy. (Dis. op.)

Kelly v. Security Mutual Life Ins. Co., 16, 21.

CONTRACT.

Breach of contract employing canal boat for fixed period;
When owner of boat entitled to recover full amount
named in contract; Burden of proof.

Milage v. Woodward, 252, 253.

REAL PROPERTY.

Vendor's lien; Property contracted to be sold subject to mortgages for certain amount, but conveyed subject to mortgages for less amount; When vendor's lien may be enforced for difference in amount.

Bach v. Kidansky, 368, 370.

WRIT OF PROHIBITION.

Crimes; Verification of information; Information, Sufficiency of; Code Cr. Pro. §§ 145, 148, 151, 194, 205, 608; When subpoena issued by magistrate to discover commission of a crime is void; Remedy of person served with void subpoena. (Dis. op.)

People ex rel. Livingston v. Wyatt, 383, 396.

JUDGMENTS.

Actions on judgments for money between original parties to the judgment; Effect of statute (L. 1896, ch. 568) amending section 1913 of Code of Civil Procedure; New York (City of); Marine Court; Change in name.

Peace v. Wilson, 403, 405.

INDIANS.

Tonawanda nation of Seneca Indians; Jurisdiction of state of New York over lands owned by nation and members thereof; Constitutionality of statute (L. 1902, ch. 296) regulating the erection of telephone and telegraph lines upon such reservation and lands; When lands occupied by members of nation deemed to have been allotted under the Indian Law (L. 1892, ch. 679, § 56); When occupant of lands may maintain action of ejectment against telephone company erecting poles and wires on his lands.

Jemison v. Bell Telephone Co., 493, 495.

SALES.

Goods sold under executory contract; Evidence; Self-serving declarations.

Eastman Kodak Co. v. Kleinhans, 613, 614.

HAIGHT, J.

WILL.

Death of legatee before payment of legacy; Presumption as to testator's intention; Legacy passes to issue of deceased legatee and not to his devisees.

March v. March, 99, 101.

COMMON CARRIER.

Stipulation in ocean steamship ticket limiting liability for loss of baggage; When recovery not confined to stipulated amount. (Dis. op.)

Tewes v. North German Lloyd S. S. Co., 151, 159.

NEW YORK CITY.

Gas companies; United States Circuit Court injunction restraining the enforcement of Eighty Cent Gas Act (L. 1906, ch. 125) no bar to action in state court by consumer restraining gas company from cutting off gas; Principle of comity not applicable:

Richman v. Consolidated Gas Co., 209, 211.

SALES.

Construction of contract for articles to be delivered at specified times in the future; Measure of damages for breach of contract; Evidence.

Haddam Granite Co. v. B. H. R. R. Co., 247, 248.

APPEAL.

Erroneous reversal by Appellate Division of judgment directing specific performance; Code Civ. Pro. § 1338.

Butler v. Wright, 259, 260.

STOCK CORPORATIONS.

Increase in capital stock thereof; Right of stockholder to subscribe for his proportionate share of new stock; When stockholder's right to take new stock waived by his demand to buy it at par; When he may not recover damages upon sale of his share of new stock to third party. (Dis. op.)

Stokes v. Continental Trust Co., 285, 301.

NEGLIGENCE.

Stenger v. Buffalo Union Furnace Co., 323, 324.

VANN, J.

INSURANCE.

Premature action to recover damages for the repudiation by a mutual life insurance company of its obligations under a policy; Remedy of policyholder in an equitable action to preserve contract of insurance.

Kelly v. Security Mutual Life Ins. Co., 16, 18.

CONSTITUTIONAL LAW.

Home rule provisions not applicable to new officers; State superintendent of elections; Office new in name and functions.

Matter of Morgan v. Furey, 202, 204.

STOCK CORPORATIONS.

Increase in capital stock thereof; Right of stockholder to subscribe for his proportionate share of new stock; When stockholder's right to take new stock not waived by his demand to buy it at par; When he may recover damages upon sale of his share of new stock to third party; Measure of damages.

Stokes v. Continental Trust Co., 285, 289.

CONTRIBUTORY NEGLIGENCE. (Dis. op.)

Cranch v. Brooklyn Heights R. R. Co., 310, 318.

TRUSTS.

When testamentary trust void as to creditors of cestui que trust; When judgment creditors may maintain action to charge property held under trust; Receiver in supplementary proceedings not necessary party plaintiff.

Ullman v. Cameron, 339, 343.

NEGLIGENCE.

Street surface railroad operated by trolley system; When railroad company liable to passenger injured by trolley pole while passing along running board of open car. (Dis. op.)

Tietz v. International Ry. Co., 347, 357.

WRIT OF PROHIBITION.

Crimes; Verification of information; Information, Sufficiency of; Code Cr. Pro. §§ 145, 148, 151, 194, 205, 608; When subpoena issued by magistrate to discover commission of a crime is void; Remedy of person served with void subpoena is by writ of habeas corpus, not by writ of prohibition.

People ex rel. Livingston v. Wyatt, 383, 388.

BUILDING CONTRACT.

Failure to comply with specifications.

Easthampton L. & C. Co. v. Worthington, 407, 408.

EJECTMENT.

Occupation by telephone wire of space above land.

Butler v. Frontier Telephone Co., 486, 488.

BUILDING CONTRACT.

Failure to comply with specifications.

Easthampton L. & C. Co. v. Worthington, 581.

WERNER, J.

CRIMES.

Uttering of forged note; Evidence of the uttering of other forged notes by defendant; When admissible; When contents of forged papers may be proved by secondary evidence; Self-serving declarations and hearsay statements; Erroneous taking of exhibits by jury; When such error does not warrant reversal of judgment of conviction.

People v. Dolan, 4, 7.

CORPORATIONS.

Personal liability of directors for wasted funds.

Bowers v. Male, 28, 29.

NEGLIGENCE.

Loss of income as an element of damage.

Kronold v. City of New York, 40, 41.

PUBLIC OFFICERS.

Unauthorized acts of state engineer in making a state survey, when a trespass; Exercise of police power not warranted; Exercise of power of eminent domain not authorized by statute directing survey; Subsequent statute ineffective as a ratification by the state; General power of the state to make a survey insufficient as a justification; Constitutional law; Acts constituting a taking of property; Remedy of landowner not confined to Court of Claims; The state is not liable for the tortious acts of its officials.

Litchfield v. Bond, 66, 71.

COMMON CARRIER.

Stipulation in ocean steamship ticket limiting liability for loss of baggage; Recovery confined to stipulated amount.

Tewes v. North German Lloyd S. S. Co., 151, 154.

ANTE-NUPTIAL CONTRACT.

Provision thereof whereby father agreed to make no distinction between his son and other children in the distribution of his estate by will; When son may enforce the contract by action in equity; Failure of son to interpose objections to father's will does not preclude maintenance of action to enforce ante-nuptial contract; Complaint in equitable action not demurrable because ante-nuptial contract would not support action at law; Validity of consideration of ante-nuptial contract.

Phalen v. United States Trust Co., 178, 181.

ATTORNEY AND CLIENT.

Erroneous enforcement of attorney's lien for services.

Matter of Speranza, 280, 281.

CONTRIBUTORY NEGLIGENCE.

Cranch v. Brooklyn Heights R. R. Co., 810, 818.

EVIDENCE.

Admissibility of parol evidence to complete written agreements executed subsequent to an oral contract.

Cooper v. Payne, 334, 336.

WILLARD BARTLETT, J.

LIMITATION OF ACTIONS.

Section 396 of the Code of Civil Procedure not affected by chapter 572 of the Laws of 1886; Infancy.

McKnight v. City of New York, 85, 86.

RIPARIAN RIGHTS.

When lower riparian owner may maintain action against a number of upper riparian owners to restrain them all, although acting separately, from polluting the waters of a stream; When complaint in such action not demurrable.

Warren v. Parkhurst, 45, 47.

BANKRUPTCY.

An adjudicated bankrupt not divested of title to cause of action unless trustee has been appointed.

Rand v. Iowa Central Ry. Co., 58, 59.

CORPORATIONS.

Reduction of number of directors; Stock Corporation Law, § 21.

Matter of Westchester Trust Co., 215, 216.

UTICA (CITY OF).

Assessment for sewer; When erroneous under statutes creating board of assessors in and for city of Utica; Certiorari to review assessment; When facts alleged in petition therefor must be deemed to be admitted by return.

People ex rel. Keim v. Desmond, 232, 234.

NEGLIGENCE.

Street surface railroad operated by trolley system; When railroad company not liable to passenger injured by trolley pole while passing along running board of open car.

Tietz v. International Ry. Co., 347, 348.

EVIDENCE.

Presumption of undue influence arising from meretricious relations, one of fact; Immoral consideration not recoverable.

Platt v. Elias, 374, 378.

LANDLORD AND TENANT.

Liability of landlord for damages caused by third party.

Pratt, Hurst & Co. v. Tailer, 417, 419.

LEASE.

Covenant for renewal.

Martin v. Babcock & Wilcox Co., 451, 452.

APPEAL.

Affirmance of judgment by Appellate Division; When Court of Appeals may reverse order affirming judgment upon exceptions to refusal of trial court to make specific findings of fact; Mortgage foreclosure; What constitutes waiver of payment of interest on corporate bonds; When such waiver precludes action to foreclose trust mortgage for non-payment of interest on bonds.

Arnot v. Union Salt Co., 501, 503.

Hiscock, J.

REAL ESTATE.

Trust deed conveying life estate with remainder to heirs of beneficiary; When adopted child takes property upon death of beneficiary; Rights of adopted child; Construction of statutes relating to rights of inheritance of adopted child.

Gilliam v. Guaranty Trust Co., 127, 131.

CRIMES.

Stay of proceedings; Bail; Re-arrest of defendant released on bail pending determination of application for stay of proceedings; Habeas corpus; Erroneous affirmance of order releasing relator from custody.

People ex rel. Hummel v. Reardon, 164, 165.

TRANSFER TAX.

Stock of Boston and Albany Railroad Company owned by non-resident testator not assessable at its full value.

Matter of Cooley, 220, 222.

STREET SURFACE RAILROADS.

Provision of statute, incorporating street surface railroad company, to keep pavement between its tracks in good repair; When applicable to extension of railroad constructed under subsequent statute; Obligation of street surface railroad company to lay new pavement between its tracks at demand of municipality.

Mayor, etc., of N. Y. v. H. B., M. & F. Ry. Co., 304, 306.

PRINCIPAL AND AGENT.

Fraud of principal a defense to action by agent to recover purchase price of stock sold; When principal's fraud no bar to recovery of amount advanced him by broker on stock sold.

Leo v. McCormack, 330, 331.

BONDS.

When trust company, acting as trustee for mortgage bonds, not liable as guarantor of bonds by reason of statement indorsed thereon.

Tschetinian v. City Trust Co., 432, 433.

NEGLIGENCE.

When village not liable for permitting slight defect in sidewalk.

Butler v. Village of Oxford, 444, 445.

TRANSFER TAX.

Policy issued upon life of non-resident of state; When proceeds thereof not subject to taxation within this state.

Matter of Gordon, 471, 473.

CHASE, J.

NEW YORK (CITY OF).

Taking of lands owned by city for water pipe lines for street purposes; When city entitled to compensation for lands so taken; Dedication of lands owned by the city, for other purposes, for street improvements; Purpose and effect of section 995 of city charter.

Matter of Mayor, etc., of New York, 237, 240.

EXPERT WITNESS.

Etroneous admission of opinion of expert upon question of fact determinable by jury.

Welle v. Celluloid Co., 319, 320.

WRIT OF PROHIBITION.

Crimes; Verification of information; Information, sufficiency of; Code Cr. Pro. §§ 145, 148, 151, 194, 205, 608; When subpoena issued by magistrate to discover commission of a crime is void; Remedy of person served with void subpoena is by writ of habeas corpus, not by writ of prohibition. (Con. op.)

People ex rel. Livingston v. Wyatt, 333, 395.

CONTRACT.

Lease for mining coal; Agreement by lessee to pay fixed royalty on coal of designated size and quality; When lessor is entitled to royalty on coal of inferior size and quality.

Genet v. D. & H. Canal Co., 422, 423.

EVIDENCE.

Erroneous exclusion of testimony tending to show inconsistency of plaintiff's claim.

Broadwell v. Conover, 429, 430.

WILL.

Acceptance of benefit under will involves renunciation of rights inconsistent with instrument.

Beetson v. Stoops, 456, 458.

PER CURIAM.

Legislative apportionment; Const. art. 3, § 5.

Matter of Sherill v. O'Brien, 1, 2.

APPEAL.

Mandamus; Appellate Division; Erroneous dismissal of an appeal from an order granting a peremptory writ of mandamus.

People ex rel. Quinn v. Voorhis, 263, 264.

ELECTION LAW.

Certificate for independent nomination valid, although made for the nomination of more than one candidate; Independent nomination for member of assembly; Whether nominee disqualified because he is a commissioner of deeds must be determined by assembly if he be elected; Contest between several sets of local Independence League nominations; When certificate first filed is entitled to preference.

Matter of Independent Nominations, 266, 278.

GRAND LARCENY.

Parting with property for an illegal purpose.

People v. Tompkins, 413, 414.

MECHANIC'S LIEN.

Insufficient notice of lien.

Finn v. Smith, 465, 466.

NEW YORK CITY.

Police department.

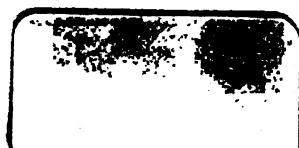
People ex rel. Hurlbut v. Bingham, 538.

TESTAMENTARY TRUSTEE.

When selection of new or substituted trustee rests in discretion of Supreme Court.

Matter of Pitney, 540.

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